SUPREME COURT OF THE UNITED STATES.

No. ~~228.~~ 139.

WILLIAM D. THOMPSON, PLAINTIFF IN ERROR,

vs.

AUGUSTIN VALARINO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

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A UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, or some of you, between William D. Thompson, plaintiff in error, and Augustin Valarino, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as is said and as appears by his complaint: we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this nineteenth day of April, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-eighth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the within writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from A to 154, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of William D. Thompson, pl'ff in error, *vs.* Augustin Valarino, def't in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 8th day of December, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

KENNETH G. WHITE, *Clerk.*

Filed July 21, '64.

B Pleas before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, of April term, in the year one thousand eight hundred and sixty-three.

Witness Samuel Nelson, esq., presiding, Kenneth G. White, esq., clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that heretofore, to wit, on the third Monday of October, in the term of October, the President of the United States of America sent to the judge of the district court of the United States for the southern district of New York, in the second circuit, a certain writ of error close in the words following, to wit:

C UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the district court of the United States for the southern district of New York, greeting :

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court, before you, or some of you, between Augustin Valarino, plaintiff, and William D. Thompson, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said and as appears by his complaint: we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the circuit court of the United States for the southern district of New York, at the City Hall, in the city of New York, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of April next, that the record and proceedings aforesaid being inspected, the said justices of the circuit court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this third Monday of October, in the year of our Lord one thousand eight hundred and sixty two, and of the independence of the United States the eighty-seventh.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

Endorsed: U. S. circuit court for the south'n dist. of New York in the 2d circuit. William D. Thompson, pl'ff in error, ags't Augustin Valarino, def't in error. Emerson and Pritchard, att'y. Allowed Oct. 24, 1862, Sam R. Betts.

Filed Oct. 28, 1862.

1 District court of the United States for the southern district of New York.

Pleas in the district court of the United States for the southern district of New York, in the second circuit, before the Honorable Samuel R. Betts, judge of the said court, of September term, in the year one thousand eight hundred and fifty-two.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that heretofore, to wit, on the first Tuesday of June, in the year one thousand eight hundred and fifty-two, before this court, at the City Hall, in the city of New York, and within the southern district of New York aforesaid, came Augustin Valarino, plaintiff, by Larocque & Barlow his attorneys, and prayed a certain writ, commonly called a writ of capias ad respondendum, to be issued out of the said court, directed, in the name of the President of the United States of America, to the marshal of the southern district of New York, commanding him that he take William D. Thompson, consul for the republic of Ecuador, if he should be found in his district, and him safely keep, so that he might have his body before the judge of the district court of the United of America for the southern district of New
2 York, at a district court to be held at the City Hall, in the city of New York, in the said southern district of New York, on the first Tuesday of

July then next, to answer unto the said Augustin Valarino in a plea of trespass, and also unto a certain bill of the said Augustin Valarino against the said William D. Thompson, upon promises, to the damage of the said Valarino, in the sum of eight thousand dollars, as was said according to the custom of the said court, before the said district court then and there to be exhibited, and that he should have then there that writ. And it was granted to him, returnable before the judge of the said court, at the City Hall, in the city of New York, and within the southern district of New York, on the first Tuesday of July, in the term of July, in the said year one thousand eight hundred and fifty-two.

At which said last-mentioned day, to wit, on the first Tuesday of July, in the year one thousand eight hundred and fifty-two, before this court, at the City Hall, in the city and within the southern district of New York, came the said plaintiff, Augustin Valarino, by Larocque & Barlow, his attorneys, and offered himself against the said defendant, William D. Thompson, consul, &c., in the plea and bill aforesaid. And the said marshal of the southern district of New York, to wit, Henry F. Tallmage, esquire, at that day returned to the said court then there that the said defendant was not found within the said district, nor did the said defendant come or appear in this court
3 before the judge thereof, according to *to* the exigency of the said writ.

Whereupon the said plaintiff prayed another writ, commonly called an alias writ of capias ad respondendum, to be issued out of the said court, directed to the said marshal of the United States for the southern district of New York, in form aforesaid, and it was granted to him, returnable before the judge of the said district court of the United States for the southern district of New York, in the second circuit, at the City Hall, in the city of New York, on the first Tuesday of August, in the said year one thousand eight hundred and fifty-two, for the said defendant to answer to the said plaintiff in the plea aforesaid. The same day was given to the said plaintiff there, &c.

At which day, that is to say, on the said first Tuesday of August, in this court, before the judge thereof, at the City Hall, in the city of New York, came the said plaintiff, by his attorneys aforesaid, and offered himself against the said defendant in the plea aforesaid. And the said marshal of the United States for the southern district of New York at that day returned to the said court that the said defendant was not found within the said district, nor did the said defendant come or appear in this court before the judge thereof, according to the exigency of the said last-mentioned writ.

Whereupon the said plaintiff prayed another writ, commonly called
4 a pluries writ of capeas ad respondendum to be isssued out of the said court, directed to the said marshal of the United States for the southern district of New York in form aforesaid, and it was granted to him, returnable before the judge of the said district court of the United States for the southern district of New York, in the second circuit, at the City Hall, in the city of New York, on the first Tuesday of September, in the said year one thousand eight hundred and fifty-two, for the said defendant to answer unto the said plaintiff in the plea aforesaid. The same day was given to the said plaintiff there, &c,.

At which day, that is to say, on this first Tuesday of September, in the said year one thousand eight hundred and fifty-two, in this court, before the judge thereof, at the City Hall, in the city of New York, comes the said plaintiff, by his atttorneys aforesaid, and the said marshal of the United States for the southern district of New York now here returns the said last-mentioned writ to him in that behalf directed, that he has taken the body of the said defendant, as by the said writ he was commanded, to answer unto

the said plaintiff as aforesaid; and the said defendant, by Emerson & Prichard, his attorneys, also comes according to the exigency of the said last-mentioned writ, and thereupon the said plaintiff declares against the said defendant as follows, to wit:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Augustin Valarino, plaintiff in this suit, by Larocque & Barlow,
5 his attorneys, complains of William D. Thompson, consul for the republic of Ecuador, defendant in this suit, being in custody, &c., of a plea of trespass on the case upon promises—

For that whereas the said defendant, on the twenty-seventh day of June, in the year one thousand eight hundred and forty-three, at the city of New York, was indebted to the said plaintiff in the sum of ten thousand dollars, lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said denfendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiff in the further sum of ten thousand dollars, like lawful money as aforesaid, for so much money before that time paid, laid out, and expended by the said plaintiff to and for the use of the said defendant, and at the like special instance and request of the said defendant; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then
and there faithfully promised the said plaintiff, well and truly to pay
6 unto the said plaintiff the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of ten thousand dollars, like lawful money as aforesaid, for money before that time had and received by the said defendant to and for the use of the said plaintiff; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to
the said plaintiff in the further sum of ten thousand dollars, like law-
7 ful money as aforesaid; and being so found in arrear and indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto wholly refused and still does refuse, to the damage of the said plaintiff of ten thousand dollars. And thereof the said plaintiff brings suit, &c.

And thereupon the said defendant craves leave to imparl to the said declaration until the first Tuesday of September, in the the term of September, in the year one thousand eight hundred and fifty-three, before the judge of this court, at the City Hall, in the city and within the southern district of New York, and it is granted to him, &c. The same day is given to the said plaintiff there, &c,

At which said last-mentioned day and place, before this court, comes the said plaintiff, by his attorneys, aforesaid.

And the said William D. Thompson, by Emerson & Prichard, his
8 attorneys, comes and defends the wrong and injury, when, &c., and prays judgment of the said bill, because, he says, that the said several supposed promises and undertakings in the said declaration mentioned, if any such were or was made, were and every of them was made by the said William D. Thompson, jointly with one Sidney Mason, who is still living, to wit, at the city of New York, and in the southern district of New York aforesaid, and not by the said William D. Thompson alone; and this he, the said William D. Thompson, is ready to verify. Wherefore, inasmuch as the said Sidney Mason is not named in the said bill together with the said William D. Thompson, he, the said William D. Thompson, prays judgment of the said bill, and that the same may be quashed, &c.

And the said plaintiff says that the said bill ought not, by reason of anything by the said defendant in his said plea alleged, to be quashed, because, he says, that before and at the time of the commencement of this suit the said William D. Thompson was consul of the republic of Ecuador for the port of New York, within the southern district of New York, admitted and approved as such by the President of the United States, and that as such consul he could not, according to the constitution and laws of the United States, be impleaded in any court except some of the district courts of the United States, which said district courts have by law jurisdiction of all civil suits against consuls exclusively of the courts of the several States, and

that the said Sidney Mason was not at the time of the commencement
9 of this action a consul or vice-consul, or liable to be impleaded in this action in this court, and that this court, at the time of the commencement of this action, had not and could not take cognizance of the plea aforesaid against the said Sidney Mason; and this the said plaintiff is ready to verify. Wherefore, inasmuch as the said defendant hath not answered the said declaration, nor hitherto in any manner denied the same, the said plaintiff, as before, prays judgment and his damages by him sustained by reason of the non-performance of the said promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

And the said William D. Thompson, as to the said replication of the said plaintiff, says that the said plaintiff ought not by reason of anything by him in that replication alleged to have or maintain his aforesaid action thereof against him, the said William D. Thompson, because, he says, that before and at the time of the commencement of this suit the said plaintiff was and still is an alien, and the said William D. Thompson and Sidney Mason then were and still are, respectively, citizens of the State of New York and residents within the southern district of New York, in the second judicial district of the United States, and that the said William D. Thompson and Sidney Mason then were and still are liable to be impleaded in the circuit court of the

United States for the southern district of New York, in the said second
10 circuit, at the suit of the said plaintiff in the plea aforesaid; and this the said William D. Thompson is ready to verify. Wherefore, inasmuch as this court cannot take cognizance of the plea aforesaid against the said Sidney Mason, and the said circuit court can take cognizance thereof against the said William D. Thompson and the said Sidney Mason, at the suit of the said plaintiff, he, the said William D. Thompson, prays judgment of the said bill, and that the same may be quashed, &c.

And the said plaintiff saith that the said rejoinder of the said defendant and the matters therein contained in manner and form as the same are therein pleaded and set forth, are not sufficient in law to quash the said bill, and that he, the said plaintiff, is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want of a sufficient rejoinder in this behalf, the said plaintiff prays judgment and his damages by him sustained by reason of the non-performance of the said promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

And the said William D. Thompson saith that the said rejoinder and the matters therein contained are sufficient in law to quash the said bill; which said rejoinder and the matters therein contained the said William D. Thompson is ready to verify and prove as the court here shall direct, &c. Wherefore, inasmuch as the said plaintiff hath not denied nor in any manner answered the said rejoinder, the said William D. Thompson, as before,
11 prays judgment of the said bill, and that the same may be quashed, &c.

And inasmuch as the said court now here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid to be before this court, at the City Hall, in the city and within the southern district of New York, on the first Tuesday of April, in the term of April, in the year one thousand eight hundred and fifty-six. The same day is given to the parties there, &c.

At which said last-mentioned day and place in this court came the parties aforesaid, by their attorneys aforesaid, and thereupon all and singular the premises being by the said court here fully seen and understood, and mature deliberation having been thereupon had, it is considered by the said court that the said rejoinder of the said defendant is not sufficient in law to quash the said bill of the said plaintiff, and that the said plaintiff ought to recover against the said defendant his damages aforesaid, notwithstanding anything by the said defendant in his said rejoinder alleged. But inasmuch as the said defendant prays leave to answer over to the said bill, therefore a day is given to him in this same court, at the City Hall, in the city and within the southern district of New York, until the first Tuesday of May, in the term of May, in the year one thousand eight hundred and fifty-six, to answer over unto the said bill of the said plaintiff. The same day is given to the said plaintiff, at the same place.

At which said last-mentioned day and place in this court came
12 the parties aforesaid, by their attorneys aforesaid.

And the said William D. Thompson, defendant in this suit, by Emerson & Prichard, his attorneys, comes and defends the wrong and injury when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him. And of this he puts himself upon the country, &c.

And for a further plea in this behalf, the said defendant, by leave of the court here for that purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because, he says, that the said defendant did not at any time within six years next before the exhibiting of the bill of the said plaintiff in this behalf undertake

or promise in manner and form as the said plaintiff hath above thereof complained against him; and this the defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And the said plaintiff as to the said plea of the said defendant by him firstly above pleaded, and whereof he hath put himself upon the country, doth the like, &c.

And the said plaintiff as to the said plea of the said defendant by him secondly above pleaded, says that he, the said plaintiff, by reason of
13 anything by the said defendant in his said second plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because, he says, that the said defendant did within six years next before the exhibiting of the bill of the said plaintiff in this behalf undertake and promise in manner and form as the said plaintiff has above thereof complained against him. And this he, the said plaintiff, prays may be enquired of by the country, &c.

And the said plaintiff, for a further replication to the said plea of the said defendant by him secondly above pleaded, by actual leave of the court for this purpose first had and obtained, says that he by reason of anything by the said defendant in his said second plea alleged ought not to be barred from having and maintaining his aforesaid action against the said defendant, because, he says, that within six years next after the making of the said several promises and undertakings in the said declaration mentioned, and each and every of them, by the said defendant, to wit, on the twenty-ninth day of June, in the year one thousand eight hundred and forty-three, to wit, at the city and in the county of New York, and within the southern district of New York aforesaid, he, the said plaintiff, commenced an action in the superior court of the city of New York, which said court then was and at all times since has been and still is an existing court of record of the State of New York, against the said defendant and one Sidney Mason, for and
14 upon the same causes of action, and each and every of them, for and upon which the said plaintiff has complained against the said defendant in his declaration in this action, in which said action in the superior court of the city of New York the said defendant appeared, and that such proceedings were afterwards had in the said action in the superior court of the city of New York that afterwards, to wit, on the twenty-fifth day of October, in the year one thousand eight hundred and forty-five, to wit, at the city and in the county of New York, and within the southern district of New York aforesaid, by the consideration and judgment of the said superior court of the city of New York, the said plaintiff recovered against the said defendant and the said Sidney Mason the sum of four thousand and sixty-nine dollars and twenty-six cents, as well for his damages which he had sustained by reason of the non-performance of the same identical promises and undertakings in his declaration in this action mentioned as for his costs and charges by him about his suit in that behalf expended in the said action in the said superior court of the city of New York, whereof the said defendant and the said Sidney Mason were convicted, as by the record of the said judgment still remaining in the said superior court of the city of New York, at the City Hall, in the city of New York, to wit, in the southern district of New York aforesaid, will more fully appear. And the said plaintiff
15 further avers that afterwards, to wit, on the twenty-second day of November, in the year one thousand eight hundred and forty-five, to wit, at the city and in the county of New York, and in the southern district of New York aforesaid, the said defendant sued and prosecuted out of the superior court of judicature of the people of the State of New York, which said last-mentioned court then was a court of record of the said State of

New York, having and exercising appellate jurisdiction over the said superior court of the city of New York, the writ of error close of the people of the State of New York, addressed to the justices of the said superior court of the city of New York, in the words or of the tenor and effect following, that is to say:

The people of the State of New York to the justices of the superior court of the city of New York, greeting:

[L. S.] Because in the record and proceedings, and also in the giving of judgment, in a certain cause, which was in our said court before you, between Augustin Valarino, plaintiff, and William D. Thompson, who was impleaded with Sidney Mason, defendant, in a plea of trespass on the case on promises, as is said, manifest error hath intervened, to the great damage of the said William D. Thompson, as he complains, and we being willing that the error, if any, should be corrected and full and speedy justice done
16 to the parties aforesaid in this behalf, do command you that if judgment be thereupon given then, without delay, you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching or in anywise concerning the same, to our justices of our supreme court of judicature, at the Capital, in the city of Albany, on the first Monday of January next, together with this writ, that the record and proceedings aforesaid being inspected by our said supreme court, we may cause to be done thereupon, for correcting that error, what of right ought to be done.

Witness Greene C. Bronson, esq., our chief justice, at the court-house, in the city of Rochester, the third Monday of October, one thousand eight hundred and forty-five.

HALLETT & OTHERS, *Clerks.*

EMERSON & PRICHARD, *Attorneys.*

And the said plaintiff further in fact says that the said record of judgment in the said writ of error mentioned and the said record of judgment hereinbefore mentioned are the same record of judgment, and not other or different, and that such proceedings were afterwards had upon the said writ of error that afterwards, to wit, on the first Monday of January, in the year one thousand eight hundred and forty-six, to wit, at the Capital, in the city of Albany, to wit, at the city and in the county and in the southern dis-
17 trict of New York aforesaid, the said justices of the superior court of the city of New York duly returned the said writ of error into the said supreme court of judicature of the people of the State of New York, with the said records and proceedings therein mentioned, and all things touching or in anywise concerning the same, as by the said writ of error they were commanded, and that afterwards, to wit, on the first Monday of May, in the term of May, in the year one thousand eight hundred and forty-six, to wit, at the City Hall, in the city of New York, to wit, in the southern district of New York aforesaid, the said defendant came into the said supreme court of judicature of the people of the State of New York, before the justices thereof, and assigned errors in the said record and proceedings, in the words or to the tenor and effect following, that is to say:

Afterwards, to wit, in the first Monday of May, in the term of May, in the year one thousand eight hundred and forty-six, before the said justices of the supreme court of judicature aforesaid, at the City Hall, in the city of New York aforesaid, comes the said William D. Thompson, plaintiff in error, by Emerson & Prichard, his attorneys, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, that before and at the time of the commencement of the

suit upon which the said judgment was rendered he was, and ever since hath continued, to be and yet is, consul of the republic of Ecuador
18 for the port of New York, within the southern district of New York, admitted and approved as such by the President of the United States. And that as such consul he ought not, according to the constitution and laws of the United States, to have been impleaded in the said suit in the said superior court of the city of New York, but only in the district court of the United States for the southern district of New York, or in some other district court of the United States, which said district courts have by law jurisdiction of all civil suits against consuls exclusively of the courts of the several States, and that the said the superior court of the city of New York had not jurisdiction of the said suit, and ought not to have taken to itself cognizance of the same. Therefore in that there is a manifest error, and this the said William D. Thompson is ready to verify. Wherefore he prays that for the error aforesaid the judgment aforesaid, in the form aforesaid given, may in all things be revoked, reversed, and altogether held for nothing, and that he may be restored to all things he has lost by occasion of the said judgment, &c.

And the said plaintiff further in fact says that afterwards, to wit, on the first Monday of July, in the term of July, in the year one thousand eight hundred and forty-six, before the justices of the said supreme court of judicature of the people of the State of New York, at the academy, in the city of Utica, to wit, at the city and in the county and in the southern dis-
19 trict of New York aforesaid, came the said plaintiff and answered the said assignment of errors in the words or to the tenor and effect following, that is to say:

And now at this day, that is to say, on the first Monday of July, in the term of July, in the year one thousand eight hundred and forty-six, before the justices of the supreme court of judicature of the people of the State of New York, at the academy, in the city of Utica, the said Augustin Valarino, defendant in error, freely comes here into court and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, because, he says, that among other things it appears by the record and proceedings aforesaid that the said William D. Thompson, plaintiff in error, appeared in the said superior court of the city of New York and voluntarily submitted himself to the jurisdiction of the said court in the plea aforesaid, in which the judgment aforesaid was rendered, and also because, among other things, by the record and proceedings aforesaid, it further appears that the promises and undertakings in the said record and proceedings mentioned for the damages sustained by him, the said Augustin Valarino, by occasion of the non-performance of which and his costs and charges by him about his suit in that behalf expended the judgment aforesaid, in form aforesaid, was rendered, were made by him, the said William D. Thompson, jointly with one Sidney Mason, as partners in trade and business, under the name, style, and firm of Mason & Thompson, to
20 wit, at the city and in the county of New York, and that the said Sidney Mason, at the time of the commencement of the said suit in which the said judgment was rendered, and also at the time of rendering the said judgment, was still living, to wit, at the city and in the county of New York, and was a party defendant to the said suit. And he prays that the said court before the aforesaid justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

And that such further proceedings were afterwards had thereupon in the said supreme court of judicature of the people of the State of New York, and in the supreme court of the State of New York, to which last-named court jurisdiction of the said proceedings in error was duly transferred by the constitution and laws of the State of New York during the pending of the said writ of error, that afterwards, to wit, on the second day of July, in the year one thousand eight hundred and fifty-one, to wit, at the city and in the county and in the *the* southern district of New York aforesaid, by the judgment and consideration of the said last-mentioned court, it was considered that there was error in the said record and proceedings in the said superior court of the city of New York, in respect of the matter by the said defendant so as aforesaid assigned for error, and the said judgment of the said superior court of the city of New York was thereby for the said error
21 so by *by* the said defendant assigned, reversed, annulled, and altogether held for nothing, and the said defendant was restored to all things which he had lost by occasion of the said judgment, as by the said writ of error and the record of the said proceedings in error, still remaining in the said supreme court of the State of New York, at the City Hall, in the city of New York, to wit, in the southern district of New York aforesaid, will more fully appear.

And the said plaintiff further in fact says that after the said reversal of the said judgment of the superior court of the city of New York, and within one year next after the reversal of the said judgment, to wit, on the second day of July, in the year of our Lord one thousand eight hundred and fifty-two, to wit, at the city and in the county of New York, and in the southern district of New York aforesaid, he, the said plaintiff, sued and prosecuted out of this honorable court a certain writ of capias ad respondendum, addressed, in the name of the President of the United States of America, to the marshal of the United States for the southern district of New York, whereby the said marshal was commanded to take the said William D. Thompson, consul for the republic of Ecuador, if he should be found in his district, and him safely keep, so that he might have his body before the judge of the district court of the United States of America for the southern district of New York, in the second circuit, to be held at the City Hall, in the city of New York, in said southern district, on the first Tuesday of July, in the
22 said year one thousand eight hundred and fifty-two, to answer unto the said plaintiff in a plea of trespass, and also to a certain bill of the said plaintiff against the said defendant for eight thousand dollars, upon promises, according to the custom of the said court, before the said judges, then and there to be exhibited, and that he should have then and there that writ, which said writ was tested in the name of the Honorable Samuel R. Betts, judge of the said district court of the United States for the southern district of New York, and was delivered to the *the* marshal of the southern district of New York, (that being the county in which the said defendant usually resided at the time of the issuing of the said writ,) within one year next after the said reversal of the said judgment of the superior court of the city of New York, to wit, on the said second day of July, in the year one thousand eight hundred and fifty-two, to wit, at the city and in the county of New York, and within the southern district of New York aforesaid.

And the said plaintiff further in fact saith that the said writ of capias ad respondendum was so sued and prosecuted by the said plaintiff against the said defendant as aforesaid, with intent to implead the said defendant upon and for the said several causes of action in the said declaration mentioned, and in good faith and with intent to be actually served and to cause him, the said defendant, to appear in the said court here, and upon his said appearance to declare against him for the said several causes of action in the said declaration mentioned.

23 And the said plaintiff further in fact says that afterwards, to wit, on the said first Tuesday of July, in the year one thousand eight hundred and fifty-two, in this court, at the City Hall, in the city of New York, came the said plaintiff, by Larocque & Barlow, his attorneys, and offered himself against the said defendant in the plea and bill aforesaid, and the said marshal of the southern district of New York, to wit, Henry F. Talmadge, esq., at that day returned to the said court that the said defendant was not found within the said district, nor did the said defendant come or appear in this court, before the judge thereof, according to the exigency of the said writ.

Whereupon the said plaintiff prayed another writ, commonly called an alias writ of capias ad respondendum, to be issued out of the said court, directed to the said marshal of the United States for the southern district of New York, in form aforesaid, and it was granted to him, returnable before the judge of the said district court of the United States for the southern district of New York, in the second circuit, at the the City Hall, in the city of New York, on the first Tuesday of August, in the said year one thousand eight hundred and fifty-two, for the said defendant to answer to the said plaintiff in the plea aforesaid. The same day was given to the said plaintiff there, &c.

At which day, that is to say, on the said first Tuesday of August, in this court, before the judge thereof, at the City Hall, in the city of New York, came the said plaintiff, by his attorneys aforesaid, and offered himself

24 against the said defendant in the plea aforesaid, and the said marshal of the United States for the southern district of New York at that day returned to the said court that the said defendant was not found within the said district, nor did the said defendant come or appear in this court, before the judge thereof, according to the exigency of the last-mentioned writ.

Whereupon the said plaintiff prayed another writ, commonly called a pluries writ of capias ad respondendum, to be issued out of the said court, directed to the said marshal of the United States for the southern district of New York, in form aforesaid, and it was granted to him, returnable before the judge of the said district court of the United States for the southern district of New York, in the second circuit, at the City Hall, in the city of New York, on the first Tuesday of September, in the said year one thousand eight hundred and fifty-two, for the said defendant to answer unto the said plaintiff in the plea aforesaid. The same day was given to the said plaintiff there, &c.

At which day, that is to say, on said first Tuesday of September, in the said year one thousand eight hundred and fifty-two, in this court, before the judge thereof, at the City Hall, in the city of New York, came the said plaintiff, by his attorneys aforesaid, and the said defendant, by Emerson & Prichard, his attorneys, also came according to the exigency of the said last-mentioned writ, and the said plaintiff offered himself and exhibited his said bill

25 and declared therein against the said defendant aforesaid in the plea aforesaid, to wit, in the southern district of New York aforesaid, as by the record and proceedings thereof remaining in this court, before the judge thereof, at the City Hall, in the city of New York, more fully and at large appears.

And the said plaintiff further in fact says that the said several writs were respectively so sued and prosecuted by him, the said plaintiff, against the said defendant as aforesaid, in good faith and with intent to be actually served and with intent to implead the said defendant upon and for the said several causes of action in the said declaration mentioned, and to cause him to appear in this court, and upon his said appearance to declare against him for the said several causes of action in the said declaration mentioned; and

this the said plaintiff is ready to verify. Wherefore he prays judgment and his damages by him sustained by reason of the non-performance of the said promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

And the said defendant as to the said replication of the plaintiff to the said plea of the defendant secondly above pleaded, and which the plaintiff has prayed may be enquired of by the country, does the like.

And the said defendant as to the said further replication of the said plaintiff to the said plea of the defendant, by him secondly above pleaded, says that the said plaintiff ought not, by reason of anything by him in that
26 replication alleged, to have or maintain his aforesaid action thereof against him, the said defendant, because, he says, that the said plaintiff did not sue or prosecute out of this court the writ of capias ad respondendum in the said replication first mentioned within one year next after the reversal of the judgment of the superior court, in the same replication mentioned, in manner and form as the said plaintiff has in his said replication alleged. And of this the said defendant puts himself upon the country, &c.

And the said plaintiff as to the said rejoinder of the said defendant by him secondly above pleaded, and whereof he hath put himself upon the country, doth the like, &c.

LAROCQUE & BARLOW, *Pl'ff's Att'ys.*

27 Therefore the issues above joined are ordered by the said district court to be tried at a stated term of the said district court, appointed to be held at the court-house, in the city and within the southern district of New York, on the first Tuesday of June, in the term of June, in the year eighteen hundred and sixty-two.

Therefore, to try the said issue, let a jury of the people thereupon come before the judges of this court, some or one of them, at the United States court building, in the city of New York, in the said southern district of New York, on the first Tuesday of June, in the year aforesaid, twelve, &c., each of whom, &c., was neither, &c., by whom, &c., because as well, &c. The same day is given to the parties aforesaid at the same place.

At which last-mentioned day, in the said district court of the United States for the said southern district of New York, before the Hon. David A. Smalley, district judge of the United States, presiding in said district court, at the United States court buildings, in said city of New York, in said southern district of New York, come as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by his attorneys aforesaid, and the jurors of the jury, of whom mention is within made, being summoned, also come, who to speak the truth of the matters within contained are chosen, tried, and sworn. And the jurors of the jury aforesaid say upon their
28 oaths that the said defendant did undertake and promise in manner and form as the said plaintiff hath above declared against him, and that he did so undertake and promise within six years next before the exhibiting of the bill of the said plaintiff in this behalf, and that the said plaintiff did sue and prosecute out of this court the writ of capias ad respondendum, in the said second replication of the said plaintiff to the said second plea of the said defendant firstly above mentioned, within one year next after the reversal of the judgment of the superior court of the city of New York, in the said replication mentioned, in manner and form as the said plaintiff has in his said replication alleged; and they assess the damages of the said plaintiff, by him sustained by reason of the non-performance of his said promises and undertakings by the said defendant, over and above his costs and charges by him about his suit in that behalf expended, at the sum of seven thousand six hundred and seventeen dollars and forty-eight cents, and for those costs and charges at six cents.

But because the said court, before the aforesaid judges thereof, now here, is not yet advised what judgment to give of and upon the premises aforesaid, therefore the process thereof is continued between the parties aforesaid, of the plea aforesaid, in this same court, before the aforesaid judges thereof, now here, until the first Tuesday of October, in the term of
29 October, in the year one thousand eight hundred and sixty-two, at the United States court buildings, in the said city of New York, in the said southern district of New York. The same day is given to the parties at the same place, for that the said court, before the aforesaid judges thereof, now here, is not yet advised thereof.

At which said last-mentioned day, before the judges aforesaid, at the place last aforesaid, came as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by his attorneys aforesaid.

And hereupon all and singular the premises aforesaid being by the said court, before the aforesaid judges thereof, now here, fully seen and understood, and mature deliberation having been had for that it seemeth to the said court, before the aforesaid judges thereof, now here, that the said verdict of the jury is right and valid in law. Therefore it is considered by the said court, before the aforesaid judges thereof, now here, that the said plaintiff do recover against the said defendant his damages aforesaid, by the jury aforesaid, in form aforesaid assessed, and also his said costs, and also three hundred and sixty-five 38-100 dollars for his said costs and charges by the said court, before the aforesaid judges thereof, now here, adjudged of increase to the said plaintiff, and with his assent, which said damages, costs, and charges in the whole amount to seven thousand nine and eighty-two dollars and eighty-six cents. And the said defendant, in mercy, &c.
30 Filed October 18, 1862.

Judgment signed and filed this 18th day of October, in the year of our Lord eighteen hundred and sixty-two.

GEO. F. BETTS, *Clerk.*

Endorsed: 220. U. S. district court. Augustin Valarino vs. William D. Thompson, consul, &c. Judgment record. Larocques & Barlow, pl'ff's att'ys, No. 35 William st., N. Y.
Filed Oct. 18, 1862.

Damages	$7,617 48
Costs and interest	365 38
	7,982 86

31 United States district court, southern district of New York.

AUGUSTIN VALARINO *against* WILLIAM D. THOMPSON. } Bill of exception.

Afterwards, to wit, at the day and place within contained, before the Honorable David A. Smalley, a district judge of the United States, holding the court in this district, comes as well the said Augustin Valarino, by Lorocque & Barlow, his attorneys, and Jeremiah Larocque, his counsel, as the said William D. Thompson, by Emerson & Prichard, his attorneys, and William Emerson, his counsel, and the jurors of the jury whereof mention is within made being called, likewise come, and after being elected, tried, and sworn to try the several issues within joined, the counsel for the said plaintiff learned in the law gave in evidence on his behalf to the said jury the record of a certain judgment of the supreme court, filed July 17, 1851, in which Augustin Valarino was plaintiff and William D. Thompson and Sidney Mason were defendants.

Pleas before the justices of the supreme court of judicature of the people of the State of New York, at the City Hall, in the city of New York,
32 of the eleventh day of April, as yet of the January term, in the year one thousand eight hundred and forty-six.

Witness: Greene C. Bronson, justice, Hallett and others, clerks.

STATE OF NEW YORK, *to wit:*

The people of the State of New York have sent to the judges of the superior court of the city of New York their writ close in these words, to wit:

In the supreme court of judicature of the people of the State of New York.

The people of the State of New York to the justices of the superior court of the city of New York, greeting:

Because in the record and proceedings, and also in the giving of judgment, in a certain cause which was in our said court, before you, between Augustin Valarino, plaintiff, and William D. Thompson, who was impleaded with Sidney Mason, defendant, in a plea of trespass in the case on promises, as is said, manifest error hath intervened, to the great damage of the said William D. Thompson, as he complains, and we being willing that the error, if any, should be corrected and full and speedy justice done to the
33 parties aforesaid in this behalf, do command you that if judgment be thereupon given, then without delay you, distinctly and openly, send, under your seal, the record and proceedings aforesaid, with all things touching or anywise concerning the same, to our justices of our supreme court of judicature, at the Capitol, in the city of Albany, on the first Monday of January next, together with this writ, that the record and proceedings aforesaid being inspected by our said supreme court, we may cause to be done thereupon, for correcting that error, what of right ought to be done.

Witness Greene C. Bronson, esq., our chief justice, at the court-house, in the city of Rochester, the third Monday of October, one thousand eight hundred and forty-five.

HELLETT AND OTHERS, *Clerks.*
EMERSON & PRICHARD, *Attorneys.*

I allow this writ of error; and the proper bond having been executed to justify a stay of execution, I hereby order a stay of proceedings on the execution upon the within-mentioned judgment, if one have been issued, and the stay of the issuing of one if none have been issued, until judgment shall be rendered on this writ of error.

Dated 22d November, 1845.

W. F. HALLETT, *Cl'k Sup. Court.*

34 The answer of the justices of the superior court of the city of New York in the within writ mentioned.

The record and proceedings whereof mention is within made, with all things touching the same, are hereby respectfully certified to the justices of the supreme court of judicature within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness Samuel Jones, esq., justice of our said court, at the City Hall of the city of New York, this 11th day of April, A. D. 1846.

[L. S.] J. OAKLEY, *Clerk.*

In the superior court of the city of New York.

Pleas in the superior court of the city of New York held in and for the city and county of New York, at the City Hall, in the city of New York, before the justices of the same court, of the term of July, in the year one thousand eight hundred and forty-three.

Witness Samuel Jones, esq., chief justice; Jesse Oakley, clerk.

CITY AND COUNTY OF NEW YORK, *ss:*

Augustin Valarino, plaintiff in this suit, by Griffin & Havens, his
35 attorneys, complains of Sidney Mason and William D. Thompson, co-partners, defendants in said suit, (the said defendant William D. Thompson being in custody, &c., and the said defendant Sidney Mason having been returned by the sheriff of the city and county of New Y., to whom the writ of capias ad respondendum issued in this cause was directed and delivered, not found,) of a plea of trespass on the case upon promises, for that whereas the said defendants, on the twenty-seventh day of June, in the year one thousand eight hundred and forty-three, at New York, to wit, at the city and in the county of New York aforesaid, were indebted to the said plaintiff in the sum of ten thousand dollars, lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiff to the said defendants, and at the special instance and request of the said defendants; and being so indebted to the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year last aforesaid, and at
36 the place aforesaid, were indebted to the said plaintiff in the further sum of ten thousand dollars, like lawful money as aforesaid, for so much money before that time paid, laid out, and expended by the said plaintiff to and for the use of the said defendants, and at the like special instance and request of the said defendants; and being so indebted the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, were indebted to the said plaintiff in the further sum of ten thousand dollars, like lawful money as aforesaid, for money before that time had and received by the said defendant to and for the use of the said plaintiff, and being so indebted the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay
37 unto the said plaintiff the said sum of money last above mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrears and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further sum of ten thousand dollars, like lawful money

as aforesaid, and being so found in arrear and indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendants should be thereunto afterwards requested. Nevertheless the said defendants, although often requested, &c., have not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof,
38 to the said plaintiff the said defendants have hitherto wholly refused and still do refuse, to the damage of the said plaintiff of ten thousand dollars. And thereof the said plaintiff brings suit, &c.

And now at this day, that is to say, on the first Monday of August, in the term of August, in the year one thousand eight hundred and forty-three, until which day the said defendants had leave to the declaration aforesaid to imparl and then to answer the same before the justices of the same court, at the City Hall, in the city of New York, comes the said plaintiff, by his attorneys aforesaid, and the said defendant Sidney Mason comes not.

And the said William D. Thompson, impleaded with Sidney Mason, defendant in this suit, by Emerson & Prichard, his attorneys, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff in this suit hath above thereof declared against the said defendants. And of this he puts himself upon the country. And the said plaintiff likewise, &c.

And hereupon the process thereof is continued between the parties aforesaid of the plea aforesaid, in this same court, before the aforesaid jus-
39 tices thereof, now here, until the first Monday of September, in the term of September, in the year one thousand eight hundred and forty-four, at the City Hall, in the city of New York. The same day is given to the parties aforesaid, at the place aforesaid. At which last-mentioned day, before the justices aforesaid, at the place last aforesaid, come as well the said plaintiff, by his attorneys aforesaid, as the said defendant William D. Thompson, impleaded as aforesaid, by his attorneys aforesaid, and the said defendant Sidney Mason comes not.

And hereupon the said plaintiff prays that Francis Griffin may be substituted as his attorney in the plea aforesaid, in the place and stead of the said Griffin & Havens, and it is granted to him, &c. And thereupon the said plaintiff puts in his place Francis Griffin as his attorney in the plea aforesaid.

And hereupon the issue above joined between the parties aforesaid is ordered by the said court, before the aforesaid justices thereof, now here, to be tried at a term of this court appointed to be held in and for the city and county of New York, at the City Hall, in the city of New York, on the first Monday of December, in the year one thousand eight hundred and
40 forty-four. Therefore, to try the said issue, let a jury of the people thereupyn come between the justices of this court, some or one of them, at the City Hall, in the city of New York, on the first Monday of December, in the year aforesaid, twelve, &c., each of whom, &c., who neither, &c., by whom, &c., because as well, &c. The same day is given to the parties aforesaid, at the same place. At which last-mentioned day, in the said superior court of the city of New York, before the Hon. Thos. J. Oakley, one of the justices of the said court, presiding therein, at the City Hall of the said city of New York, come as well the said plaintiff, by his attorney aforesaid, as the said defendant William D. Thompson, impleaded as aforesaid, by his attorneys aforesaid, and the said defendant Sidney Mason, impleaded as aforesaid, comes not. And the jurors of the jury of whom mention is within made, being summoned, also come, who to speak the truth of the matters

within contained are chosen, tried, and sworn. And the jurors of the jury aforesaid say upon their oath that the said defendants did undertake and promise in manner and form as the said plaintiff hath above declared against them, and they assess the damages of the said plaintiff, by
41 him sustained by reason of the non-performance of their said promises and undertakings, by the said defendants, over and above his costs and charges by him about his suit in this behalf expended, at three thousand eight hundred and fifty-four dollars and five cents, and for those costs and charges at six cents.

But because the said court of the people, before the aforesaid justices thereof, now here, is not yet advised what judgment to give of and upon the premises aforesaid, therefore the process thereof is continued between the parties aforesaid of the plea aforesaid in this same court, before the aforesaid justices thereof, now here, until the first Monday of October, in the term of October, in the year one thousand eight hundred and forty-five, at the City Hall, in the city of New York. The same day is given the parties aforesaid, at the same place, for that the said court of the people, before the aforesaid justices thereof, now here, is not yet advised thereof.

At which said last-mentioned day, before the justices aforesaid, at the place last aforesaid, came as well the said plaintiff, by his attorney aforesaid, as the said defendant William D. Thompson, impleaded as aforesaid, by his attorneys aforesaid, and the said defendant Sidney Mason, impleaded as aforesaid, comes not.

And hereupon all and singular the premises aforesaid being by the
42 said court, before the aforesaid justices thereof, now here, fully seen and understood, and mature deliberation having been had, and for that it seemeth to the said court, before the aforesaid justices thereof, now here, that the said verdict of the said jury is right and valid in the law, the exceptions of the said defendant William D. Thompson, impleaded as aforesaid, against the same alleged to the contrary thereof in anywise notwithstanding.

Therefore it is considered by the said court, before the aforesaid justices thereof, now here, that the said plaintiff do recover against the said defendants his damages aforesaid, by the jury aforesaid, in form aforesaid assessed, and also his said costs, and also two hundred and fifteen dollars and fifteen cents for his said costs and charges by the said court, before the aforesaid justices thereof, now here, adjudged of increase to the said plaintiff, and with his assent, according to the form of the statute in such case made and provided; which said damages, costs, and charges in the whole amount to four thousand and sixty-nine dollars and twenty-six cents.

And the said defendant in mercy, &c.

Filed October 25th, 1845, 11.45 a. m.

Judgment signed this 25th day of October, in the year of our Lord one thousand eight hundred and forty-five.

S. JONES.

(Here follows in the record referred to the testimony given at the
43 trial in the superior court of the city of New York, with the objections and exceptions, judge's charge, &c., as stated in the bill of exceptions. These are omitted in this place, as all that is material in this action was put in evidence upon the trial before the U. S. district judge in this court and is hereinafter stated.)

Afterwards, to wit, on the first Monday of May, in the year one thousand eight hundred and forty-six, before the said justices of the supreme court of judicature aforesaid, at the City Hall, in the city of New York aforesaid,

come the said William D. Thompson, plaintiff in error, by Emerson & Prichard, his attorneys, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, that before and at the time of the commencement of the suit upon which the said judgment was rendered, he was and ever since hath continued to be, and yet is, consul of the republic of Ecuador for the port of New York, within the southern district of New York, admitted and approved as such by the President of the United States, and that as such consul he ought not, according to the constitution and laws of the United States, to have been impleaded in the said suit in the said the superior court of the city of New York, but only in the district court of the United States
44 for the southern district of New York, or in some other district court of the United States, which said district courts have by law jurisdiction of all civil suits against consuls exclusively of the courts of the several States, and that the said the superior court of the city of New York had not jurisdiction of the said suit, and ought not to have taken to itself cognizance of the same. Therefore in that there is manifest errror; and this the said William D. Thompson is ready to verify. Wherefore he prays that for the error aforesaid the judgment aforesaid, in form aforesaid given, may in all things be revoked, reversed, and altogether held for nothing, and that he may be restored to all things he has lost by occasion of the said judgment, &c.

And now at this day, that is to say, on the first Monday of July, in the term of July, in the year one thousand eight hundred and forty-six, before the justices of the supreme court of judicature of the people of the State of New York, at the academy, in the city of Utica, the said Augustin Valarino, defendant in error, freely comes here into court and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, because, he says, that, among other things, it appears
45 by the record and proceedings aforesaid that the said William D. Thompson, plaintiff in error, appeared in the said superior court of the city of New York and voluntarily submitted himself to the jurisdiction of the said court in the plea aforesaid in which the judgment aforesaid was rendered, and also because, among other things, by the record and proceedings aforesaid it further appears that the promises and undertakings in the said record and proceedings mentioned, for the damages sustained by him, the said Augustin Valarino, by occasion of the non-performance of which, and his cost charges by him about his suit in that behalf expended, the judgment aforesaid, in form aforesaid was rendered, were made by him, the said William D. Thompson, jointly with one Sidney Mason, as partners in trade and business, under the name, style, and firm of Mason & Thompson, to wit, at the city and in the county of New York, and that the said Sidney Mason, at the time of the commencement of the said suit in which the said judgment was rendered, and also at the time of rendering the said judgment, was still living, to wit, at the city and in the county of New York, and was a party defendant to the said suit. And he prays that the said court, before the aforesaid justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above as-
46 signed for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

But because the said supreme court of judicature, before the aforesaid justices thereof, now here, is not yet advised what judgment to give of and upon the premises, therefore the process thereof is continued between the said parties of the plea aforesaid, in this same court, before the aforesaid justices thereof, now here, until the first Monday of July, in the year one thousand eight hundred and forty-seven, at the academy, in the city of Utica.

The same day is given to the parties aforesaid, at the same place, for that the said court will advise thereof, &c.

At which said last-mentioned day and place, before the justices aforesaid, in the said supreme court of judicature of the people of the State of New York, come the said parties, by their attorneys aforesaid, and hereupon it is suggested and manifestly appears to the said court that, by virtue of the new constitution of the State of New York and the statutes in pursuance thereof made and provided, the jurisdiction of this suit, and of all proceedings upon the plea aforesaid, between the parties aforesaid, is vested in the supreme court of the State of New York established by said constitu-
47 tution. But because the said supreme court of the State of New York, before the justices thereof, is not yet advised what judgment to give of and upon the premises aforesaid, therefore the process thereof is continued between the parties aforesaid of the plea aforesaid in the said last-mentioned court, before the aforesaid justices thereof, now here, until the second day of July, as yet of the term of May, in the year one thousand eight hundred and fifty-one, at the City Hall, in the city of New York. The same day is given to the parties aforesaid, at the same place, for that the said supreme court of the State of New York, before the aforesaid justices thereof, now here, will advise thereof, &c.

At which said last-mentioned day, before the said justices of the supreme court of the State of New York, at the City Hall, in the city of New York, come the parties aforesaid, by their respective attorneys aforesaid. Whereupon, as well the record and proceedings aforesaid, and the judgment aforesaid in form aforesaid given, as the matter aforesaid, by the said William D. Thompson, above for error assigned, being seen, and by the said supreme court, before the aforesaid justices thereof, now here, fully understood, and mature deliberation being thereupon had, it appears to the said court,
48 before the aforesaid justices thereof, now here, that in the record and proceedings aforesaid, and also giving the judgment aforesaid, there is manifest error in respect to the matter above assigned for error by the said William D. Thompson.

Therefore it is considered that the judgment aforesaid, for the error aforesaid, be reversed, annulled, and altogether held for nothing, and that the said William D. Thompson be restored to all things which he hath lost by occasion of the said judgment, &c.

And it is further considered that the said William D. Thompson do recover against the said Augustin Valarino two hundred and seventy-four dollars and four cents for his costs and charges by him laid out and expended in and about the prosecution of the aforesaid writ of error, and by the said court now here adjudged to the said William D. Thompson, and with his assent, and that he have execution thereof, &c.

Judgment signed this 17th day of July, in the year one thousand eight hundred and fifty-one.

GEORGE W. RIBLET, *Clerk.*

A capias ad respondendum issued in this action, with a deputation endorsed thereon as of July 2d, 1852. Also the continuance of process by an
49 alias and a pluries writ, as follows:

[SEAL.] The President of the United States of America to the marshal of the southern district of New York, greeting:

We command you that you take William D. Thompson, consul for the republic of Ecuador, if he shall be found in your district, and him safely keep, so that you may have his body before the judge of the district court of the United States of America for the southern district of New York, at a district court to be held at the City Hall, in the city of New York, in the said south-

ern district, on the first Tuesday of July next, to answer unto Augustin Valarino in a plea of trespass, and also to a certain bill of the said Augustin Valarino against the said William D. Thompson upon promises, to the damage of the said Valarino in the sum of eight thousand dollars, as is said, according to the custom of the said court, before the said district court then and there to be exhibited, and that you have then there this writ.

Witness Samuel R. Betts, esq., district judge, at the city of New York, the first Tuesday of June, in the year one thousand eight hundred and fifty-two.

GEORGE W. MORTON, *Clerk.*

LAROCQUE & BARLOW, *Attorneys.*

Endorsements.

50 U. S. district court for the S. D. of N. Y. Augustin Valarino *vs.* William D. Thompson, consul for the republic of Ecuador. Capias, ret'r. 1st Tuesday of July, 1852. Filed July 16th, 1852. Larocque & Barlow, att'ys for pl'ff.

SIR: Please to take the appearance of the defendant hereon.
June, 1852. Y'rs, &c.,
LAROCQUE & BARLOW, *Att'ys for Pl'ff.*

To the U. S. MARSHAL.

I hereby depute J. Thompson to execute the within process.
Dated 2 July, 1852.
H. F. TALLMADGE, *U. S. Marshal.*

Defendant not found.
H. F. TALLMADGE, *U. S. Marshal.*

51 [SEAL.] The President of the United States of America to the marshal of the southern district of New York, greeting:

We command you, as we have before commanded you, that you take William D. Thompson, consul for the republic of Ecuador, if he shall be found in your district, and him safely keep, so that you may have his body before the judge of the district court of the United States of America for the southern district of New York, to be held at the City Hall, in the city of New York, in the said southern district, on the first Tuesday of August next, to answer unto Augustin Valarino against the said William D. Thompson upon promises, to the damage of the said Valarino in the sum of eight thousand dollars, as is stated, according to the custom of the said court, before the said district court then and there to be exhibited, and that you have then there this writ.

Witness Samuel R. Retts, esq'r, district judge, at the city of New York, the first Tuesday of July, in the year one thousand eight hundred and fifty-two.

GEO. W. MARTIN, *Clerk.*

LAROCQUE & BARLOW, *Attornies.*

52 *Endorsements.*

U. S. district court for the S. D. of N. Y. Augustin Valerino *vs.* William D. Thompson, consul for the republic of Ecuador. Alias capias, ret. 1st Tuesday of August, 1852. Larocque & Barlow, att'y for pl'ff.

SIR: Please take the appearance of the defendant hereon.
July, 1862. Y'rs, &c.,
LAROCQUE & BARLOW, *Att'ys for Pl'ff.*

To the U. S. MARSHAL *for the S. D. of N. Y.*

Defendant not found.

H. F. TALLMADGE, *U. S. Marshal.*

I hereby depute W. W. Lyon to execute the within process.
Dated 26 July, 1852.

H. F. TALLMADGE, *U. S. Marshal.*

[SEAL.] The President of the United States of America to the marshal of the southern district of New York, greeting:

53 We command you, as we oftentimes before commanded you, that you take William D. Thompson, consul for the republic of Ecuador, if he shall be found in your district, and him safely keep, so that you may have his body before the judge of the district court of the United States of America for the southern district of New York, at a district court to be held at the City Hall, in the city of New York, in the said southern district, on the first Tuesday of September next, to answer unto Augustin Valarino in a plea of trespass, and also to a certain bill of the said Valarino against the said William D. Thompson on promises, to his damage eight thousand dollars, as is said, according to the custom of the said court, before the said district court then and there to be exhibited, and that you have then there this writ.

Witness Samuel R. Betts, esq'r, district judge, at the city of New York, the first Tuesday of August, in the year one thousand eight hundred and fifty-two.

GEO. W. MORTON, *Clerk.*

LAROCQUE & BARLOW, *Attornies.*

Endorsements.

U. S. district court for the S. D. of N. Y. Augustin Valarino *vs.* William D. Thompson, consul of the republic of Ecuador. Pluries capias, ret.
54 1st Tuesday Sept., 1852. Larocque & Barlow, pl'ff's att'ys.

Filed Sept. 13, 1852.

SIR: Please take the appearance of the defendant hereon.
N. Y., Aug't, 1852. Y'rs, &c.,
LAROCQUE & BARLOW, *Pl'ff's Att'ys.*
To the MARSHAL *of the S. Dist. of N. Y.*

I hereby promise to appear at the return day of the within writ, and pray the court to enter my appearance accordingly.
Dated Aug. 26, 1852.

Personally served upon the within-named defendant.
Sept. 4, 1852.

H. F. TALLMADGE, *U. S. Marshal.*

I hereby depute Wm. W. Lyon to execute the within process.
Dated 26 Aug., 1852.

H. F. TALLMADGE, *U. S. Marshal.*

33 Pearl st.

The plaintiff's counsel also produced from the files of the court and gave in evidence the record of the proceedings in this cause down to the time of this trial, as the same are contained in the record of judgment in this court accompanying this bill of exceptions, the postea and subsequent pro-
55 ceedings having been since added at the foot of the said record.

It having been stipulated between the connsel for the respective parties that instead of producing the witnesses to be personally examined, testimony taken at the former trial in the superior court might be read from

the case printed for the appeal to the court of appeals, plaintiff's counsel read from such printed case as follows, namely:

Joseph B. Collins, being duly sworn, testified as follows:

I was secretary of the Mutual Safety Insurance Company during the whole of the year 1842, and have been ever since. The book which I produce is the receipt book of said company. Mason & Thompson on the 12th May, 1843, received from the company $2,100 84-100 for a total loss on cargo by the schooner America. The signature to the receipt is in the handwriting of Mr. Thompson, of the firm of Mason & Thompson. The witness then read a receipt in the words following:

$2,100 84-100. NEW YORK, *May* 12, 1843.

Rec'd from the Mutual Safety Ins. Co. twenty-one hundred 84-100 dollars, in full for total loss mer'd'se per sch'r America, under policy 11,790,
56 and hereby guarantee the company against any claim upon them from any other quarter, on account of this loss, until 5th September, 1843.

(S'd) MASON & THOMPSON.

The witness then continued: I produce the original policy of insurance on which the loss was paid.

Plaintiff's counsel then read the original policy of insurance.

This policy is numbered 11,790, dated August 27th, 1842, effected by Mason & Thompson, on account of whom it may concern, loss payable to them at and from New Orleans to La Guayra on cargo on one half of the schooner America. Amount insured $2,750. On the back of the policy are endorsed the following words: by the vice-president of the company.

Pay a total loss under this policy of two thousand one hundred dollars and eighty-four cents, ($2,100 84-100.)

12 May, 1843.

AL'D PELL, *V. P.*

Pay a return premium of fifteen 42-100 dollars for short interest, ($15 42.)

12 May, 1843.

AL'D PELL, *V. P.*

Plaintiff's counsel read from the testimony of said witness Collins.

57 An affidavit, sworn by David H. De Meza and Joseph Curriel before Thomas N. Morgan, associate judge of the city court of New Orleans, on the 24th February, 1843, being produced and shown to the witness he testified: I have seen it before. I took it from the archives of the office. It must have been handed into the office by Mason & Thompson. I have no doubt it was handed in by them.

The witness then read the affidavit to the court and jury, which is in the following words:

STATE OF LOUISIANA, *City of New Orleans:*

Personally, before me, Thomas N. Morgan, an associate judge of the city court of New Orleans, come David H. De Meza and Joseph Curiel, both residents of this city, who, being duly sworn upon the Holy Evangelists, do solemnly declare that they were well acquainted with Mr. Miguel Vidal as well as with William D. Anderson, master of the Venzuelian schooner America, which cleared out from this port on the 31 August, 1842, for Curacoa; that it is to the knowledge of these deponents that it was the intention of the said Vidal, the supercargo, and of the said Anderson, master of the said sch'r, to touch at La Guayra on the voyage aforesaid, and that there
58 were two passengers who took their passage for La Guayra aboard

said schooner on the voyage aforesaid, and that it is not unusual for vessels bound to Curacoa to touch at La Guayra.

Deponents also declare that the said Vidal declared to them that it was his intention to sell out his cargo at La Guayra should the state of the market there justify him in so doing. The said schooner was also advertised in New Orleans for La Guayra and Curacoa.

DAVID H. DE MEZA.
J. CURIEL.

Sworn to and subscribed before me this 24 day of February, 1843. The word Anderson erased and Vidal substituted.

THOS. N. MORGAN, *Associate Judge.*

The witness then continued: There was a short interest under the policy, and we returned $15 42-100 of the premium to Mason & Thompson on that account.

The witness being cross-examined further testified: I have not had particular charge of this transaction. This is the only receipt which defendants gave us for the money. I know it is, because it would be superflous to ask two receipts. If they had given any other paper it would have been placed in my possession. The receipt book I have exhibited is kept with the other books of the office, in the iron safe. I do not know whether any other
59 papers were exhibited by Mason & Thompson. I found the affidavit I have read among the archives of the office. In case of a loss of this kind, where the vessel has never been heard from, and where we have entire confidence in the integrity of the assured, we only require a simple affidavit of the assured that no other insurance has been effected, and pay the loss on that. When the vessel has never been heard from it is difficult to exhibit any other papers. We generally require duplicates of the bill of lading and invoice. In this case there was a return of premium for short interest. I never saw copies of the invoices or bills of lading; they are not invariably required. We generally take it for granted where a party asks short payment that he means to deal fairly by us. The usage of the office is not to keep the preliminary proofs, but to give them back to the party claiming a loss if he wishes it.

Being again examined on the direct the witness further testifies: If an assured has insurances in different offices on the same property, after exhibiting the proofs to one he might want them to exhibit to the other. I have searched the office for papers connected with this loss and find no
60 others than what I have produced.

John Whitehead, another witness produced and examined on the part of plaintiff, being duly sworn, testifies as follows: I was secretary of the Sun Mutual Insurance Company during the whole of the year 1842, and have been ever since. I know Mason & Thompson, the defendants. Our office paid to them a loss on the cargo of the schooner America. I have their receipt. The receipt book which I produce is that of the Sun Mutual Insurance Company. The receipt which I read is signed in the name of Mason & Thompson by Mr. Thompson, a member of that firm. The witness then read the receipt in evidence to the court and jury in the following words: New York, April 8th, 1843, received from the Sun Mutual Ins. Company two thousand and seventy-two 32-100 dollars, the same being for a total loss on one half of the cargo of the Venzuelian schooner America, Anderson master, which vessel sailed from New Orleans on or about the beginning of September, 1842, bound to La Guayra and a market, and was cleared by M. Vidal, of Curacoa. No shipping documents of the said cargo being furnished recourse has been had to bills of parcels, receipts, &c., to prove the shipment

of the property, and the adjustment made agreeably thereto, but as
61 yet no full and satisfactory evidence has been produced that the property claimed for was that which was intended to be insured according to the order of McKaighn & Golding, as per the annexed copy of a letter, dated at La Guayra, August 10th, 1842. We therefore bind ourselves to produce within six months from the date hereof the customary proofs showing the authority of McKaighn & Golding to order said insurance, and that the property shipped, for which said documents have been procured and presented, was the property so intended to be insured. Those proofs being the affidavit of McKaighn & Golding that the property was their own, or if not their own they to produce evidence of the authority of the owner or owners to order said insurance, and an affidavit setting forth the circumstances under which the said M. Vidal became the shipper of the cargo; failing to produce said proofs or such others as may be satisfactory to the company within the period specified, then the amount to be refunded, with legal interest.

Copy of the letter referred to above.

LA GUAYRA, *August* 10, 1842.

Messrs. Mason & Thompson, New York:

GENTLEMEN: On the receipt of this you will please effect insurance
62 on a cargo to be shipped by the schooner America, Captain William D. Anderson, from New Orleans to La Guayra, to the amount of five thousand five hundred dollars, your currency. The America was to have left Curacoa on the 6th instant to proceed to New Orleans to take in a cargo, where she will be detained but a few days and return to this place.

Yours, truly,

(Signed) McKAIGHN & GOLDING.

Mason & Thompson. Signed in duplicate.

The witness then continued:

We also returned the defendants $15 43 cents of the premium for short interest.

Plaintiff's counsel then read the original policy of insurance last mentioned.

This policy, under which the loss was paid, was effected by Mason & Thompson, on account of whom it may concern; loss payable to them at and from New Orleans to La Guayra, on one half cargo of the sch'r America. The policy is number 2,235 and dated August 27th, 1842. The amount insured is $2,750. On the back of the policy are endorsed orders for the payment of a total loss and return of premium, signed by the president in the following words:

APRIL 8, 1843.

Pay twenty-one hundred and thirty-two 87-100 dollars, in full for a total loss due 1 Sept. next.

A. B. N., *P.*

2,132 87
60 55

2,070 32

APRIL 8, 1843.

63 Return fifteen and 43-100 dollars for premium on short interest, and cancel policy.

A. B. N., *P.*

$15 43-100.

The witness, being cross-examined by the defendant's counsel, further testified:

I was requested by the plaintiff's attorney to bring all the papers that I could find relating to this transaction, and brought them all. It is not usual to submit proofs to the secretary. They are exhibited to the president or vice-president. The further proofs required by the receipt must have been exhibited, or I suppose the money would have been reclaimed. We paid the loss just before the other company paid theirs. The proofs might have been taken away after our loss was paid, to be exhibited to the other company. In case of a missing vessel we generally require duplicates of the bill of lading and invoice and an affidavit that no other insurance has been effected.

The witness being further examined on the direct testified as follows:

It is not usual for insurance offices to keep the proofs of loss and interest when they are wanted by the assured to be shown to another office. I do not know how the policy got out of my possession. Sidney Mason and William D. Thompson compose the firm of Mason & Thompson.

Francis Griffin, another witness produced and examined on the part
64 of the plaintiff, being duly sworn, testified as follows:

I am attorney for the plaintiff in this suit. I exhibited to the Sun Mutual Insurance Company, on the 29 June, 1843, at 12 o'clock noon, and before this suit was commenced, the papers which I hold in my hand, and which are as follows:

1st. The statement of J. S. McKaighn, as follows:

I, J. S. McKaighn, merchant, of the city of La Guayra, trading under the firm of McKaighn & Golding, do hereby certify that on or about the 8th day of August, eighteen hundred and forty-two, my house received instructions from Augustin Valarino, of Caraccas, then in Curacoa, under date of 3d August, to have insurance effected on the cargo of the Venezuelian schooner America, William D. Anderson master, (which vessel was then on her voyage from Curacoa to New Orleans,) at and from New Orleans to La Guayra, at which port she was to touch on her way to Curacoa; the flour forming part of her cargo having been sold here, to arrive. And I further declare that, in conformity with said instructions received as above, the house of McKaighn & Golding, acting as agents of said Augustin Valarino, ordered, under date of tenth of August, their correspondents in New York, Messrs. Mason & Thompson, to have the cargo of said schooner America insured to cover the amount of five thousand five hundred dollars, currency of
65 the United States, from New Orleans to La Guayra; which insurance the house was advised by Mason & Thompson had been made from Curacoa to New Orleans and thence to La Guayra.

In witness whereof, I have hereunto set my hand and seal this eighteenth day of April, in the year of our Lord one thousand eight hundred and forty-three.

J. S. McKAIGHN. [L. S.]

Signed, sealed, and delivered in the presence of—

T. MARGUER.

F'C'S ANTO. ARRELLAZA.

2d. The certificate of William P. Dieter, as follows:

I, William P. Dieter, do hereby certify that the statements contained in the above certificate, signed by J. S. McKaighn, of the firm of McKaighn & Golding, of this city, in whose counting-room I was employed in the capacity of accountant at the time of the occurrence of the transaction above referred

to, are, to the best of my knowledge and belief, correct and true, and as such entitled to full credit.

La Guayra, April 8, 1843.

WM. P. DIETER.

Witness: ULYSSES ELY.

3d. The consular certificate of Anderson P. Dieter, acting consul of the United States, that the signature of McKaighn to the foregoing statement is genuine and the facts stated by him entitled to full faith and credit.

66 4th. A copy of a bill of parcels and certificate, as follows:

NEW ORLEANS, *August* 27, 1842.

Mr. Vidal bought of Lindley & Russell:

53 barrels of prime pork, at 4½ $238 50

We hereby certify the above to be a copy of the bill mentioned on the day above, and that the am't, say two hundred and thirty-eight 50-100 dollars, was paid to us by Mr. Vidal in specie.

LINDLEY & RUSSELL.

5th. Copy of another bill of parcels and another certificate, as follows:

Mr. Vidal to A. Prieur, DR.

August 30, 1842.	For 700 barrels flour, at $4¼	$2,975 00
	391 bags corn, 974½ bus., at 35 cts.....	341 07
	20 barrels pork, at $4 50.....	90 00
	Drayage to schooner America.....	43 43
	Lining of 700 barrels flour.....	28 00
		3,477 50

NEW ORLEANS, 26*th December*, 1842.

I hereby certify the above to be a copy of the bill rendered on the day above, and that the amount, say three thousand four hundred and seventy-seven dollars and fifty cents, was paid to me by Mr. Vidal in specie.

A. PRIEUR.

67 6th. A copy of the manifest of the cargo of the America on the voyage in question, as follows:

Shipper's export manifest.

Manifest of all the goods, wares, merchandize, and specie shipped by Miguel Vidal on board the Venezuelian schooner America, whereof Wm. D. Anderson is master, bound for the port of Curacoa.

M'ks.	Nos.	Packages or articles in bulk.	Contents or [illegible.]	Value of domestic produce or merchandize.	Value of foreign produce or merch'e.
------	------	Five hogsheads.....	Tobac., W. I., 4,036 lbs	$357 60	----------
------	------	Fifty barrels.....	Pork, 10,000 lbs.....	225 00	----------
------	------	Seven hundred barrels	Flour.....	2,975 00	----------
------	------	Three hundred and ninety-one sacks.	Corn.....	341 07	----------
------	------	Twenty barrels.....	Pork, W. I., 4,000 lbs	90 00	----------

I, Miguel Vidal, do solemnly swear that the within manifest contains a full, just, and true account of all the goods, wares, merchandize, and specie of every kind shipped by me on board the above-named vessel, and that the quantities and values of each article are truly stated according to their actual cost or the values which they truly bear in this port at this time. And I further swear that the said merchandize is truly intended to be exported to and landed in Curacoa. So help me God.

MIGUEL VIDAL.

Sworn this 31st day of Aug., 1842, before me.

——— ———, *Collector.*

68 7th. Copy of a letter from McKaighn & Golding to the defendants, which is as follows:

LA GUAYRA, *February 15th*, 1843.

Messrs. Mason & Thompson, New York:

GENTLEMEN: We have received your favor of the 10th requesting that we would forward to you the shipping documents of the cargo of the America. All the information that we are in possession of with regard to this matter is that the America left Curacoa on the 16th of August last for New Orleans with doubloons for account of Mr. Aug. Valarino. Captain Anderson was his agent, and we are unable to say whether he consigned the property to any house there or not, but we suppose that the only evidence of the property having been shipped that now exists is her clearance and the manifest put in at that time of her outward cargo, which we trust will be sufficient to establish the claim.

Yours, truly,

(Signed) McKAIGHN & GOLDING.

8th. Copy of a letter from McKaighn & Golding to the defendants, which is as follows:

69 LA GUAYRA, *Aug.* 10, 1842.

Messrs. Mason & Thompson, New York:

GENTLEMEN: On the receipt of this you will please to effect an insurance on a cargo to be shipped by the schooner America, Capt. William D. Anderson, from New Orleans to La Guayra, to the amount of five thousand five hundred dollars, your currency. The America was to have left Curacoa on the 6th inst., to proceed to New Orleans to take in a cargo, where she will be detained but a few days and return to this place.

Yours, truly,

(Signed) McKAIGHN & GOLDING.

9th. Copy of a letter from McKaighn & Golding to the plaintiff, which is as follows:

LA GUAYRA, *Nov.* 6, 1842.

Augustin Valarino, esq'r., Curacoa:

DEAR SIR: We hand you the enclosed bill of lading for one hundred doubloons, shipped per schooner Active to your address. As yet we have no intelligence of the America. Messrs. Mason & Thompson wrote us from New York, under date of 12th ulto., that they had effected insurance on her cargo for five thousand five hundred dollars. Accompanying this you will
70 also please find several letters.

Yours, truly,

(Signed) McKAIGHN & GOLDING.

The above 100 doubloons were received from J. Jose Gonzales.

10th. Copy of a letter from McKaighn & Golding to the plaintiff, which is as follows:

LA GUAYRA, *Aug.* 8, 1842.

A. Valerino, esq., Curacoa:

DEAR SIR: Your two favors dated the 3d inst., we received this day, enclosing bills of lading for $1,721, per sch'r Active, for J. J. Gonzales, which will go up to Curacoa to-morrow, if landed in time. We also received account sale of the articles shipped per the America. Net proceed $750 75, and a draft on Mr. Gonzales for the same amount. The Active will proceed to Barcelona or Cumana to-morrow, as there is no flour in bond or deposite here, and in fact very little in the place. We have not a barrel in store for sale. We note that the America was to sail for New Orleans on the 6th inst., and have no doubt she will make a good voyage. On her return here your instructions shall have our attention. This goes by Harrison,
71 who will give you all the news of the place.

Yours, truly, McKAIGHN & GOLDING.

Mr. McKaighn in Curaccas.

11th. Consular certificate, which is as follows:

CONSULATE OF THE UNITED STATES OF AMERICA,
La Guayra, Venezuela.

I, Anderson D. Dieter, acting consul of the United States for this port, do hereby certify that the annexed four letters, dated as follows: Feb. 15th, 1843, to Messrs. Mason & Thompson, New York; Aug. 10, 1842, to same; Nov. 6, 1842, to Augustin Valarino, Curacoa; Aug. 8, 1842, to same, are true and correct copies of said letters, having been personally taken from their book of correspondence by me.

Given under my hand and seal this eighth day of April, A. D. 1843.

[L. S.] ANDERSON D. DIETER, *Acting Consul, U. S. A.*

12th. Copy of report and manifest of the cargo laden at the port of New Orleans on board the Venezuelian schooner America, whereof Wm. D. Anderson is master, bound for Curacoa, substantially the same as No. 6, preceding, together with the said master's affidavit, sworn to the 31st Aug., 1842. The latter is as follows:

72 I, G. D. Anderson, master or commander of the schooner America, bound from the port of New Orleans to Curacoa, do solemnly, sincerely, and truly swear that the manifest of the cargo on board the said schooner, now delivered by me to the collector of the district and subscribed with my name, contains, according to the best of my knowledge and belief, a full, just, and true account of the goods, wares, and merchandize now actually laden on board said vessel, and of the value thereof; and if any other goods, wares, and merchandize shall be laden or put on board the said schooner previous to her sailing from this port, I will immediately report the same to the collector. I do also swear that I verily believe the duties on all the foreign merchandise therein specified have been secured according to law, and that no part thereof is intended to be relanded within the United States, and that if by any distress or other unavoidable accident it shall become necessary to reland the same, I will forthwith make a just and true report thereof to the collector of customs of the district wherein such distress or accident may happen. So help me God.

GULIELM D. ANDERSON.

Sworn to this 31 day of August, 1842, before me.

——— ———, *Collector.*

73 13th. Copy of defendant's letter to McKaighn & Golding:

NEW YORK, 12 *Oct.*, 1842.

Messrs. McKaighn & Golding, La Guayra:

GENT: Since our respects of 16th August we have had no opportunity known to us to write you, and now have to own receipt of your favors of 18 and 21 July, 10 and 10 Aug, and 2d ulto., contents of which we answer. We have also the acc't sales of 15 casks of gin ½ net proceeds, to our credit of $174 21-100. We now send you invoice and bill of lading for a box of paper containing 100 reams and borders, amount $111 41 to your debit in account. We have in order and manufacturing every instrument asked for by Dr. Vargas. They are not yet ready, and you may say to him they have the attention of the writer, who was formerly an acquaintance of his. We now hand you account sales of 824 bags coffee and lignumvitæ, with $6,990 50-100 net proceeds, half of which, say $3,499 25-100, we credit you with in account. We hope soon to have sales from you of our joint account adventure, that may prepare for the close of the year; and we regret that the America did not arrive at a better market. We effected insurance on the cargo
74 sent in the America from La Guayra to New Orleans on $5,500, at 2 per cent., in two policies, and debit your account with $140 premium. We debit your account with $189 and $4-100 more in lieu of $188 4-100 as you advise, the premium of exchange being erroneously carried out 40 35 in lieu of 41 35. We are sorry to say that the report we made you of rumor was too true, and the result will be a bad one; so says report. And we have also to regret that our market offers no inducement for new adventures. Coffee has had a downward tendency for some time, and now is sold as low as eight cents; the stock is not large, but the quality is inferior, and has been so all the season. Coffee not well dried and shipped in damp vessels does not improve. A sale to take place to-morrow, at Boston, of 1,000 bags, we are sure will not bring much over the price we name at 6 months. Indigo is quiet, and no demand for hides; this is the season for them, but they sell at very low rates. We disposed of 100 for Roberts & Arrellaga, at 9½, 30-lb. hides; since then we could not have obtained that price again for them. Provided plenty, and prices low, we shall have this pleasure again soon, and now send you prices of our market this day, and remain respectfully, your obd't serv't.

MASON & THOMPSON.

75 14th. Copy of defendant's letter to McKaighn & Golding, as follows:

NEW YORK, *Feb'y* 4, 1843.

Messrs. McKaighn & Golden, La Guayra:

GENTLEMEN: We had last this pleasure on the 19th ulto., and remain still without any advices from you, or even a reply to our letters in November, by any of the numerous arrivals from your port since their receipt. This is not such treatment as we have deserved or had a right to expect from you, and it is the more necessary when your own interests in our hands are suffering from the want of the requisite attention on your part. We are still without the slightest document on which to found our claim for insurance on cargo by the schooner America, insured by your order from New Orleans to La Guayra, although it would seem that months since you supposed her to be lost, and there now remains no doubt of it. We wrote to our agent at New Orleans, but all that he could learn after a careful search was that the cargo was shipped by a Mr. Vidal, who went passenger in her. The goods appear at the custom-house to have been cleared for Curacoa, and not La Guayra, although no doubt they were bound there, according to your orders;
76 but we must have some vouchers for this, and it behooves you to look carefully and promptly to it, to remedy this discrepancy and omission.

In the mean time we have much reason to be surprised, and to feel agrieved at the manner in which you have treated our claim on you, present through Mr. J. E. Manson. Our claim is due whether yours on the underwriters is paid not. There is no doubt it will be paid when you give us the means of recovering it, but in the mean time we must insist that ours on you should be settled, without making it dependant on your New Orleans speculations, or mixing up our business or diverting the proceeds of our goods or our property to any other than our own purposes, which as honorable men you cannot do, and we will not believe you capable of it. We hope soon to hear that our requests are attended to, and remain truly your friends and serv'ts.

MASON & THOMPSON.

15th. Copy of defendant's letter to McKaighn & Golding, as follows:

NEW YORK, *Feb.* 18, 1843.

Mess. McKaighn & Golding, La Guayra:

77 GENTLEMEN: By the several further arrivals from your port we have not received a line from you, nor have the efforts of our agent at New Orleans enabled them to procure the slightest support to our claim for insurance on the America's cargo. It supprises us that you have paid so little regard to things of this nature, so long after you had reason to believe the vessel was lost. We had certainly reason to expect at least that some attention would be paid to the settlement of the am't due to us by you, and must now urge that it be no longer delayed. Coffee is more firm, good green worth 8½ cents, hides 9¼, indigo 1 10 to 1 15. We remain truly your obd't servants.

MASON & THOMPSON.

16th. Copy of defendant's letter to Mr. Kaighn & Golding, as follows:

"John Drew." NEW YORK, 23*d Nov'r*, 1842.

Messrs. McKaighn & Golding, La Guayra:

78 GENTLEMEN: Your favor of the 25th ulto. is this moment received, and your request regarding the insurance on cargo by the Michigan will receive our attention, as your wishes always have done; although we regret to perceive you pay so little attention to ours, or what is due to yourselves as men of business. Not one word have we from you about the documents for the cargo of the America, and our letters to you on that subject do not even command a reply. If you have received no regular shipping papers, we request you to send us such proofs as you can furnish that the vessel, although cleared for Curacoa, was really bound for La Guayra, as we suppose to have been the case. Your own declaration to that effect will go for something, although it would be very imperfect evidence to present to an underwriter. We must do the best we can under the circumstances, and only wait to hear from you to decide what can be done.

Respectfully your obd't serv'ts,

MASON & THOMPSON.

The witness then continued: I exhibited these papers to the president and vice-president. Mr. Neilson, the president, made at the time the memorandum, which I read:

The annexed documents are exhibited by Francis Griffin, esq., to the Sun Mutual Insurance Company, for account of whom it may concern, this day at 12 o'clock m.

New York, June 29, 1843. A. B. NEILSON, *Prest.*

79 MARCH 27, 1844.

I this day detached from this parcel three original papers, to annex the same to a commission to La Guayra, viz: an original charter-party between Capt. William D. Anderson and Augustin Valarino, of the schooner America, dated August 5, 1842; a letter originally from Augustin Valarino to McKaighn & Golding, dated Curacoa, August 4, 1842, and an original letter from Augustin Valarino to McKaighn & Golding, dated Curacoa, August 3, 1842. All of said originals are marked "March 27, 1844, F. G." in my handwriting.

(Signed) F. GRIFFIN.

The papers were tied together and the seal of the company put upon them. I afterwards detached three papers, which are attached to the commission issued to La Guayra. They are the charter-party of the schooner America, the letter of William D. Anderson, her captain, to McKaighn; and the plaintiff's letter to McKaighn & Golding, dated Curacoa, August 3, 1842. The receipt of Mason & Thompson to the Sun Mutual Insurance Company, which has been read in evidence, was produced at the time of said interview
80 between witness and the said president and vice-president. My object in exhibiting the papers was to comply with its terms. The president and vice-president of the company expressed themselvessatis fied with the papers, as a compliance with the terms of the receipt.

The witness being cross-examined by the defendant's counsel, further testified: What I have testified took place before the commencement of this suit. The suit was commenced a day or two afterwards. I did not give notice to Mason & Thompson of my intention to exhibt the papers, to my recollection. Neither Mason nor Thompson, nor any person for them, was present at the time, unless I might be considred as acting for them. I was acting for whom it might concern. I asked Mr. Neilson to certify that the papers were satisfactory. He answered that they were satisfactory, but that a certificate was unnecessary. He said that he did not want to seem to be taking any part in this controversy.

81 The witness being again examined on the direct, further testified: I did not exhibit these papers to the Mutual Safety Insurance Company. I saw the officers of that company, and it did not seem to be necessary from the terms of their receipt. They claimed no further proofs. Mr. Pell, the vice-president of the Mutual Safety Insurance Company, was the person I saw. The officers of the company appeared to be satisfied. I did not ask the question.

Alfred Seton, another witness produced and examined on the part of the plaintiff, being duly sworn, testified as follow: I was vice-president of the Sun Mutual Insurance Company during the whole of the year 1842, and have been ever since. I know Mason & Thompson, the defendants. I have heard the testimony of Mr. Collins given in this case, and the affidavit of De Meza & Curiel, of 24 February, 1843, read in evidence by him. It was also exhibited to our office. My impression is it was exhibited by Mason & Thompson. We granted the policy from New Orleans to La Guayra. The vessel was reported by Mason & Thompson to have sailed early in the fall. Mason & Thompson were urgent that we should settle the loss, although by custom the loss is not payable in case of a missing vessel until the expiration of a year after she has sailed, and that year had not elapsed in this case. The defendants could not furnish the bills of lading and invoices. We did
82 not know Vidal, the supercargo, who bought the cargo, and wished to identify him with the assured. Mason & Thompson exhibited to us the bills of parcels of the cargo, the clearance for Curacoa, and they represented to us that this was the cargo which the policy covered. Mr. Thomp-

son represented that our policy attached to this property, and that the vessel and cargo were lost. The papers afterwards exhibited by Mr. Griffin were satisfactory to show that the property for which we paid the loss was that meant to be covered by the policy, and that the vessel was bound for La Guayra. These were the two points left in doubt by the proofs which Mason & Thompson exhibited; and in consequence of that we exacted the receipt which has been read. The papers exhibited by Mr. Griffin were perfectly satisfactory.

The witness on cross-examination by the defendant's counsel, further testified: We did not retain the papers exhibited by Mason & Thompson, that I know. A parcel of papers being handed to the witness by the defendant's counsel he testified: I believe they are the papers exhibited to us by Mason & Thompson.

(It was here agreed by the counsel for the respective parties that these papers should be considered as in evidence on the part of the defendants.)

83 Our loss was paid early in April. The papers Mason & Thompson exhibited to us must have been exhibited some days before. The usual proofs of such a loss are proofs of interest, such as the invoice and bills of lading, and the affidavit of the assured that no other insurance has been effected. We required a certificate that satisfactory evidence should be produced to us, which was afterwards done by Mr. Griffin. We were perfectly satisfied with the proofs exhibited by Mr. Griffin. The receipt has never been surrendered to Mason & Thompson The signers of that receipt are absolved from any demand we could ever have upon them. I say, as an officer of the company that they are absolved from any claim we could ever have upon them. Mr. Neilson is president of the company; either of us in the other's absence has power to bind the company. I was present with Mr. Neilson, the president, when Mr. Griffin exhibited the papers. I expressed myself satisfied, as I could not do otherwise; and the president likewise did. The case was perfectly clear. A resolution by the loss committee afterwards would not rescind this determination. They are called in to advise in case of doubt. In case of a disputed loss the claimant would have a right to refer to the finance committee, and if not satisfied with their determination, to bring it before the full board of trustees. But that is only in case of a disputed loss. Here was no dispute. If the board of trustees had been

84 afterwards dissatisfied in this case, they would have no right to review our decision. It was a matter adjudicated and settled by the proper officers of the company.

Plaintiff's counsel then read from the commission issued to La Guayra and Puerto Cabello, in the year 1859, the testimony of John Roberts—

First. To the first interrogatory he saith that his name is John Roberts; of the age of forty-three almost; that here sides in Caracas; and is a merchant by occupation.

Second. To the second interrogatory he saith that he knows the person of the plaintiff, but has not seen him for several years, and believes that said plaintiff is residing in Europe, and that he knew the plaintiff from the end of the year one thousand eight hundred and thirty-nine to the end of the year one thousand eight hundred and forty-eight, or the greater part thereof; that in the year one thousand eight hundred and forty-two said plaintiff, Augustin Valarino, resided and transacted business in La Guayra and in Curacoa; and further the defendant is only known to him by name, but not personally.

Third. To the third interrogatory he saith that in the year one thousand eight hundred and forty-two he resided in La Guayra; was a member of the house of Roberts & Arillaga, and was not during that year in the employ of any other firm.

85 Fourth. To the fourth interrogatory he saith that he does not know if the firm of McKaighn & Golding, of La Guayra, received any letter from Augustin Valarino, requesting them to cause insurance to be effected on the cargo of the schooner America, and that he does know the handwriting of said Augustin Valarino.

Fifth. To the fifth interrogatory he saith that he knoweth not.

The answers to the 6th and 7th interrogatories being objected to by defendant's counsel, are waived by plaintiff's counsel.

Eighth. To the eighth interrogatory he says that the master of the schooner America, when dispatched from Curacoa was William D. Anderson, and that he is supposed to have been lost at sea on his return voyage from New Orleans. And further he knoweth not.

The answers to the 9th, 10th, and 11th interrogatories being objected to by defendant's counsel, are waived by plaintiff's counsel.

Twelfth. To the twelfth interrogatory he saith that the said schooner America is supposed to be lost at sea on her return from New Orleans, and that so far as he knows neither the vessel nor any one on board of her have been heard of up to the present time.

Thirteenth. To the thirteenth interrogatory he saith that he is in no way connected or related with the late William D. Anderson, but knows
86 his handwriting, as also the handwriting of Augustin Valarino; that the document produced purporting to be a charter-party of schooner America, bears, in his opinion, the genuine signatures of William D. Anderson and Augustin Valarino, but he is unacquainted with the other, signature.

Plaintiff's counsel reads charter-party of the schooner America, attached to commission as follows:

This charter-party, made and concluded upon in the city of Curacoa, this fifth day of August, in the year one thousand eight hundred and forty-two, between Capt. W. D. Anderson, owner of the sch'r America, of La Guayra, of the burthen of one hundred and fifty-nine tons or thereabouts, register measurement, now lying in the harbor of Curacoa, of the first part, and Augustin Valarino of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the party of the second part, does covenant and agree on the freighting and chartering of the said vessel unto the said party of the second part, for a voyage from this port of Curacoa to New Orleans and back to this port, touching La Guayra, and if convenient to the charterer he may discharge whatever cargo he or his agent may think proper there, on the terms following, that is to say:

87 First. The said party of the first part does engage that the said vessel in and during the said voyage shall be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such voyage.

Second. That said party of the first part does further engage that the whole of said vessel (with the exception of the cabin, the deck, and the necessary room for the accommodation of the crew and the storage of the sails, cables, and provisions,) shall be at the sole use and disposal of the said party of the second part during the voyage aforesaid, and that no goods or merchandise whatever shall be laden on board otherwise than from the said party of the second part, or his agent, or without his consent, on pain of forfeiture of the amount of freight agreed upon for the same.

Third. The said party of the first part does further engage to take and receive on board the said vessel during the aforesaid voyage all such lawful goods and merchandise as the said party of the second part, or his agent, may think proper to ship.

And the said party of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said party of the first part, does covenant and agree with the said party of the first part to charter and hire the said vessel, as aforesaid, on the terms following, that is to say:

88 First. The said party of the second part does engage to provide and furnish to the said vessel with full cargoes of goods or merchandise at Curacoa, and at New Orleans within the reach of the tackles.

Second. The said party of the second part does further engage to pay to the party of the first part, or his agent, for the charter or freight of the said vessel during the voyage aforesaid in manner following, that is to say:

One thousand and four hundred hard dollars, but all port charge and pilotage to be paid by the said party of the first part at New Orleans and Curacoa; but should the vessel discharge some part of her cargo at La Guayra, that the port charge and pilotage shall be paid by the said party of the first part, and then the said party of the second part shall have to pay the port charge, &c., of Curacoa.

The said party of the second part does agree to advance the said party of the second part, in New Orleans, the amount that may be required to satisfy the port charge and pilotage that may occur, which amount is understood to be for ac. of the said party of the first part; the lighterage at La Guayra to be for the account of the said party of the second part; the amount of freight is to be paid in Curacoa.

It is further agreed between the parties to this instrument that the said party of the second part shall be allowed for the loading and discharg-

89 ing of the vessel at the respective ports aforesaid lay days as follows, that is to say: dispatch in Curacoa and at New Orleans twelve days, and in case the vessel is longer detained, the said party of the second part agrees to pay to the said party of the first part demurrage at the rate of sixteen Spanish milled dollars per day, day by day, for every day so detained, provided such detention shall happen by default of the said party of the second part, or his agent.

It is also further understood and agreed that the cargo or cargoes shall be received and delivered at the ports of loading and discharging.

It is also further understood and agreed that this charter shall commence this fifth day of August, eighteen hundred and forty-two.

To the true performance of all and every of the foregoing covenants and agreements the said parties each to the other do bind themselves, their heirs, executors, administrators, and assigns, (especially the said party of the first part, the said vessel, her freight, tackle, and appurtenances, and the said party of the second part, the merchandise to be laden on board,) each to the other, in the penal sum of the amount of freight stated annexed dollars.

In witness whereof, the said parties have hereunto interchangeably

90 set their hands and seals the day and year first above written.

A. VALERINO.
WM. D. ANDERSON.

Sealed and delivered in presence of—
D. A. JESSURUN.
S. E. L. MADURO.

Endorsed: March 27, 1844. F. G.

MARCH 29, 1844.

At the execution of a commission for the examination of witnesses, in a suit wherein Augustin Valarino is plaintiff and Sidney Mason and William D. Thompson are defendants, this paper writing was shown to John Roberts,

Isaac T. Golding, and Anderson D. Dieter, and by them severally subscribed and deposed unto at the time of their examination, before me.

ALLEN A. HALL, *Commissioner.*

Subscribed by—
ANDERSON D. DIETER.
JOHN ROBERTS, Jr.,
I. F. GOLDING.

Fourteenth. To the fourteenth interrogatory he saith that the letter shown purporting to be in the handwriting of Wm. D. Anderson, is, in his opinion, in said Anderson's handwriting, as also the signature to same.

Answer to 15 interrogatory is objected to by defendant's counsel,
91 and waived by plaintiff's counsel.

Sixteenth. To the sixteenth interrogatory he saith that he was not present at an interview between Mr. McKaighn and John B. Gill, at the time mentioned, or at any other time.

Lastly. To the last interrogatory he saith that he is not aware of anything further in this case which might be advantageous to the plaintiff, except an early settlement of it.

The answers to the cross-interrogatories were then read by the counsel for defendant.

First cross-interrogatory. To the first cross-interrogatory he saith that the business of McKaighn & Golding, during the year 1842, was a general commission business, principally in American provisions; and further knoweth not.

Second cross-interrogatory. To the second cross-interrogatory he saith that he knoweth not.

Third cross-interrogatory. To the third cross-interrogatory he saith that he understood the consignees of the schooner America at Curacoa were Vidal & Co.; and further knoweth not.

Fourth cross-interrogatory. To the fourth cross-interrogatory he saith that he repeats the answer given to the ninth direct interrogatory, and that further he knoweth not.

92 Fifth cross-interrogatory. To the fifth cross-interrogatory he saith that towards the end of the year one thousand eight hundred and forty-two the concerns of McKaighn & Golding were transferred by them to the house of Elizondo Hermanos, as he has since learned, for the benefit of their creditors, and he does not think it was generally known at that time that McKaighn & Golding were in difficulties, neither was it known to this deponent; and further he knoweth not.

The answer to the sixth cross-interrogatory being objected to by plaintiff's counsel, was waived by defendant's counsel.

Seventh cross-interrogatory. To the seventh cross-interrrogatory he saith that he knoweth not.

Eighth cross-interrogatory. To the eighth cross-interrogatory he saith that he knoweth not.

Ninth cross-interrogatory. To the ninth cross-interrogatory he saith that he has some knowledge of the laws relating to the collection of debts in La Guayra, and that in the year mentioned the process was by suit at law.

Tenth cross-interrogatory. To the tenth cross-interrogatory he saith that he knoweth not.

Eleventh cross-interrogatory. To the eleventh cross interrogatory he saith that he knoweth not.

93 Twelfth cross-interrogatory. To the twelfth interrogatory he saith that he has not seen Augustin Valarino since the year one thousand eight

hundred and forty-eight, and believes him to be now living; has heard that he resides in Spain, but cannot say positively; and further he knoweth not.

Thirteenth cross-interrogatory. To the thirteenth cross-interrogatory he saith that he is not aware of anything more than he has already declared which could be advantageous to the defendants in this matter.

Plaintiff's counsel reads from said commission the deposition of Isaac T. Golding, and defendant's counsel his answers to the cross-interrogatories.

First. To the first interrogatory he saith that his name is Isaac T. Golding; that he is of the age of fifty-nine years; that he resides in La Guayra; and that he is by occupation a barge owner.

Second. To the second interrogatory he saith that he is acquainted with the plaintiff in this suit, but is not acquainted with the defendant; that to the best of his knowledge said plaintiff resided and transacted business during the year one thousand eight hundred and forty-two in La
94 Guayra and Curacoa, but does not know where he now resides, although he believes him to reside in Europe, and that he has known said plaintiff since the year one thousand eight hundred and thirty-two.

Third. To the third interrogatory he saith that in the year one thousand eight hundred and forty-two he resided in La Guayra, and that he was during that year a member or partner in the house of McKaighn & Golding.

Fourth. To the fourth interrogatory he saith that in the month of August, one thousand eight hundred and forty-two, the firm of McKaighn & Golding received a letter from the plaintiff, Augustin Valarino, requesting them to cause insurance to be effected on the cargo of the schooner America, the original of which is annexed, marked "A;" that he knows the handwriting of said Valarino, and that the letter referred to is in his handwriting.

Fifth. To the fifth interrogatory he saith that the firm of McKaighn & Golding did, on the tenth day of August, in the year one thousand eight hundred and forty-two, write a letter to Mason & Thompson, of New York, requesting them to effect the insurance referred to in the last preced-
95 ing interrogatory, a copy of which letter, marked B, is annexed to this deposition.

Sixth. To the sixth interrogatory he saith that from advices received from Curacoa, the schooner America sailed from that port on or about the sixth day of August, one thousand eight hundred and forty-two, bound to New Orleans, and was to return to La Guayra and Curacoa, and that he presumes the object in ordering her to both these ports was to try the markets in both places.

Seventh. To the seventh interrogatory he saith that he knoweth not what cargo or funds the said schooner had on board when she sailed from Curacoa, neither does he know where or from whom, or for whose account her cargo was purchased; that he knoweth not how, by whom, or for whose account the same was forwarded to Curacoa, nor by whom and for whose account the same was there received; that he knoweth not what cargo the schooner was to take on board at New Orleans, nor for whose account; that he knoweth not whether any of said cargo was sold to arrive at La Guayra, nor by whom, if sold, by whose directions, nor for whose account; that the firm of McKaighn & Golding were in the habit of forwarding funds belonging to Valarino to Vidal & Co., in Curacoa, but he knoweth not if any of the funds by them forwarded to Vidal & Co. were used in the purchase of the said cargo in Curacoa, if any was purchased, or if any of the same were used
96 in New Orleans for the purchase of a cargo for said schooner there.

Eighth. To the eighth interrogatory he saith that he knoweth not positively by whom the said schooner was despatched from Curacoa, but believes she was despatched by Vidal & Co.; that William D. Anderson was master of said schooner, and that he is supposed to have been lost at sea; that from common report he believes that said schooner had a supercargo on

board, whom he also believes to have been lost at sea; that he believes the name of the supercargo was Vidal.

Ninth. To the ninth interrogatory he saith that he believes that the said voyage of said schooner was for account of the plaintiff, Valarino; that he was so informed by letter of said Valarino; and further he knoweth not.

Tenth. To the tenth interrogatory he saith that the firm of McKaighn & Golding had not, either directly or indirectly, any interest whatever in the said voyage or adventure, nor in said outward or homeward cargo of the said schooner from Curacoa or New Orleans.

Eleventh. To the eleventh interrogatory he saith that McKaighn & Golding had no other connection with Augustin Valarino than the ordinary transactions of buying and selling, and transacting business for him in
97 their capacity of general commission merchants.

Twelfth. To the twelfth interrogatory he saith that the schooner America is supposed to have been lost at sea; that she has not to his knowledge arrived either at La Guayra or Curacoa, and that to his knowledge neither the master, supercargo, or crew have ever been heard of since leaving New Orleans, on the voyage aforesaid; and that further he knoweth not.

Thirteenth. To the thirteenth interrogatory he saith that he is in no way connected with or related to W. D. Anderson, the master of the said schooner America on the voyage in question; that he knows his handwriting, and also the handwriting of Augustin Valarino; that the paper writing now shown to him, annexed to the affidavits of John Roberts, prefixed to a commission executed by Allen A. Hall, on the fourth day of July A. D, 1844, purporting to be a charter-party of said schooner America, is signed in the handwriting of Augustin Valarino and William D. Anderson; that he does not know either D. E. Jessurin or S. E. L Maduro, nor is he acquainted with their signatures.

Fourteenth. To the fourteenth interrogatory he saith that the firm of McKaighn & Golding was insolvent from the first of November, one thousand eight hundred and forty-two, and went into liquidation about that time; that an attempt by Mason & Thompson, of New York, after that time, to
98 collect from McKaighn & Golding, by process of law, the sum of three or four thousand dollars and upwards would have resulted the same as a like attempt from any other creditors of said firm of McKaighn & Golding; that the concern had then made an assignment and was in liquidation, and they would have had to await the result.

Sixteenth. To the sixteenth interrogatory he saith that he was not present at an interview between McKaighn and John B. Gill, in the month of November or December, 1842, or at any other time; that to the best of his knowledge and belief said Gill was only once in the house of McKaighn & Golding, and that no conversation then took place in reference to this suit, said visit having been made in said house long before the commencement of this suit.

Last interrogatory. To the last interrogatory he saith that he is not aware of anything more to the advantage of the plaintiff in this suit.

First cross-interrogatory. To the first cross-interrogatory he saith that the business of McKaighn & Golding, during the year 1842, was a general commission business; that the principal articles which they dealt in were American provisions, and that the amount of business transacted by them was from fifteen to twenty-five thousand dollars per month.

99 Second cross-interrogatory. To the second cross-interrogatory he saith that the letter referred to in the fourth interrogatory was dated the third day of August, 1842, and was received by a vessel from Curacoa in due course of time; that it was first seen by him in the office of McKaighn & Golding some time in the month of August and before the tenth of that month.

Third cross-interrogatory. To the third cross-interrogatory he saith that he refers to his answer to the sixth direct interrogatory, and that further he knoweth not.

Fourth cross-interrogatory. To the fourth cross-interrogatory he saith that he founded his answer to the ninth direct interrogatory on a letter received from Augustin Valarino already referred to, and that further he knoweth not in reference to the first part of this interrogatory, but in reference to the latter part of this cross-interrogatory he saith, that McKaighn & Golding had no claim whatever on the cargo of schooner America, either for commissions, advances, or otherwise.

Fifth cross-interrogatory. To the fifth cross-interrogatory he saith that his means of knowledge of the concern of McKaighn & Golding are from having been a partner in the house; that in October, 1842, the business of McKaighn & Golding was transferred to Elizondo Hermanos for the
100 benefit of the creditors; that the assets of said firm amounted to seventy thousand dollars and upwards, and that the debts amounted to sixty-nine thousand dollars and upwards; that between the fifteenth of October, 1842, the time when said transfer to Elizondo Hermanos took place, the sum of two thousand nine hundred dollars was paid in cash on account of the debts of McKaighn & Golding; that he cannot say when it was first publicly known in La Guayra that the firm of McKaighn & Golding was insolvent, but that on the first of November, 1842, it was not publicly known.

Sixth cross-interrogatory. To the sixth cross-interrogatory he saith that McKaighn & Golding did make an assignment to Elizondo Hermanos, but that he has not in his possession the assignment referred to, nor has he any means of procuring said document or a copy thereof.

Seventh cross-interrogatory. To the seventh cross-interrogatory he saith that on the fifteenth of October, 1842, the business of McKaighn & Golding was given over to Elizondo Hermanos for the benefit of the creditors; that during the month of October and some time thereafter various sums of money were received and paid out; that P. I. Cadue was paid the sum of four thousand three hundred and fifty-one dollars, including the two
101 thousand nine hundred dollars mentioned in the answer to the fifth cross-interrogatory; that the said sum of four thousand three hundred and fifty-one dollars was paid as follows, viz: two thousand nine hundred dollars in cash, and the balance was paid by accepting and paying drafts for the account of said P. I. Cadue; that this said amount of four thousand three hundred and fifty-one dollars was not paid by Elizondo Hermanos in liquidation of the accounts of McKaighn & Golding, and after the firm was insolvent and the business transferred to Elizondo Hermanos; that the said sum of four thousand three hundred and fifty-one dollars was paid to said Cadue in pursuance of some agreement with I. S. McKaighn, (the partner of the firm of McKaighn & Golding,) and which agreement was not understood by this deponent; that this agreement last referred to was, however, made before the business of McKaighn & Golding was transferred to Elizondo Hermanos, although the money was paid after the transfer of said business.

Eighth cross-interrogatory. To the eighth cross-interrogatory he saith that he is not aware what the total amount may be that has been paid by McKaighn & Golding, or their assigns, on account of the estate of
102 McKaighn & Golding, since the 15th day of October, 1842, because the books and accounts were handed over to the assignees, Elizondo Hermanos, which firm ceased to exist about twelve years since; and further he knoweth not.

Ninth cross-interrogatory. To the ninth cross-interrogatory he saith that he was acquainted with the method in use in La Guayra, in 1842, for col-

lecting debts; that the process was by suit at law, by which the debtor could be cited before the judge of the mercantile tribunal for any sum over one hundred dollars, or if for a lesser sum he could be cited before an alcalde or justice of the peace; by these means debts could be promptly collected, provided the debtor had property or means wherewith to pay.

Tenth cross-interrogatory. To the tenth cross-interrogatory he saith that the firm of McKaighn & Golding did, in the early part of January, 1843, receive a letter from John S. Manson in reference to the subject mentioned in this cross-interrogatory, and that said letter was lost, and consequently cannot be annexed.

Eleventh cross-interrogatory. To the eleventh cross-interrogatory he saith
that McKaighn & Golding did reply to the letter referred to in the
103 previous cross-interrogatory; that a copy of such reply annexed to a
commission executed by Allen A. Hall, in La Guayra, on the fourth of July, 1844, and now shown this deponent, is a true copy of the original.

Twelfth cross-interrogatory. To the twelfth cross-interrogatory he saith that he has not seen Augustin Valarino for five years, more or less; that he believes he is now living, and in Europe; that when he last knew of his residence, it was when he resided in La Guayra and Caracas; and that further he knoweth not.

Thirteenth cross-interrogatory. To the thirteenth cross-interrogatory he saith that he does not believe he can state anything further to the advantage of the plaintiff in this suit.

Defendant thereupon offered as a part of the deposition of said Golding in answer to the cross-interrogatories a copy of the letter from McKaighn & Goulding to Manson, the new agent of Mason & Thompson referred to in the answer to the 10th cross-interrogatory, as follows :

LA GUAYRA, 3*d January*, 1843.

John S. Manson, esq., present:

SIR : We have received your letter of to-day, and in reply have
104 only to remark that Messrs. Mason & Thompson have to recover from
the underwriters insurance on cargo, per America from New Orleans, $5,500 round, which is double the amount to their credit on our books.

Your ob't serv'ts,

(Signed) McKAIGHN & GOLDING.

To the introduction of this letter the plaintiff, by his said counsel, did then and there object, and insisted that the same was not competent as against the plaintiff.

Whereupon the said defendant, by his said counsel, did insist that he was entitled to read the paper in question, it being a part of the witness's answer, and being a maternal part of his narration of the res gesta.

And the said district judge did then and there give his opinion, and decide to exclude the said letter; to which said opinion and decision of the said district judge the said defendant, by his said counsel, did then and there except.

The plaintiff's counsel called upon the defendant's counsel to produce the original letter of McKaighn & Golding to Mason & Thompson, of August 10th, 1842, referred to in the depositions of the witnesses Roberts and
Golding, and it being produced, read in evidence a translation of the
105 letter of the plaintiff to McKaighn & Golding of August 3, 1842, annexed to said depositions, and said original letter of August 10, 1842, as follows :

CURACOA, *Aug.* 3, 1842.

Messrs. McKaighn & Golding, La Guayra:

GENTLEMEN: I enclose note of sale and bill of exchange for the balance. The America will sail without fail the sixth instant for New Orleans, chartered for one thousand seven hundred and fifty dollars, Macuquino currency, for going and returning.

I beg you to cause to be insured by the first opportunity, five thousand five hundred hard dollars, in the most economical manner, for my account, which insurance shall be only on the return of said America from New Orleans to La Guayra.

Flour is scarce in this—the last sales are at 10 pesos. The flour of the house of Mr. Boulton was sold at 9¼ pesos, by Mr. Manuel Torres. I remit one thousand three hundred and fifty-three pesos in Seville pieces, in two bags. Please do me the favor of sending them to Mr. Juan Jose Gonzales, at Caraccas, as soon as possible.

I am yours, truly, VALARINO.

106 Mr. Manuel Torres is the supercargo of the schooner Active, Capt. Luis Malesius.

VALE'D. (A mark.)

Instead of one thousand and three hundred and fifty-three, it is one thousand seven hundred and twenty-one.

VALE'D.

There are three bags instead of two.

LA GUAYRA, *August* 10, 1842.

Messrs. Mason & Thompson, New York:

GENTLEMEN: On the receipt of this you will please effect insurance on a cargo to be shipped by the schooner America, Capt. William D. Anderson, from New Orleans to La Guayra, to the amount of five thousand five hundred dollars, your currency. The America was to have left Curacoa on the 6th instant to proceed to New Orleans, to take in a cargo, where she will be detained but a few days and return to this place.

Yours, truly,

(Signed) McKAIGHN & GOLDING.

Plaintiff's counsel thereupon read in evidence the preliminary proofs
107 exhibited to the companies by the defendants and referred to in the testimony of the witness Alfred Seton.

Original, with inclosures, per Eugene Grausset, esq.; duplicate without ditto, per mail.

NEW ORLEANS, 4*th March*, 1843.

Messrs. Mason & Thompson, New York:

GENTLEMEN: Without any of your esteemed favors before me, I have only to refer myself to my last respects of 1st instant. Under cover I now forward to you the following papers relating to the cargo of the Venezuelian schooner America, Capt. Anderson.

Bill of Henry Rodewald against Mr. Vidal for 2 hhds. tobacco, certified before Judge Morgan, of the city court, $122 55.

Ditto of Kelly & Coningham against David H. De Meza for 3 hhds. do. as above, $236 05; endorsed by certificate of Mr. David H. De Meza, that such was for account of Mr. Vidal as above.

Ditto of Lindley & Russel against Mr. Vidal for 53 barrels flour, certified as above, $238 50. N. B.—Of this flour 3 bbls. were intended for stores.

Ditto of Alexander Prieur against Mr. Vidal for 700 barrels flour;
108 391 bags corn; 20 barrels pork; certified as above, $3,477 50.

Shipper's export manifest, embracing all the above, certified as above, $3,988 67.

Difference $85 93 between the bills and the manifest, occasioned by the 3 barrels flour for ship's stores and such charges as are not made upon the manifest, a package of "dray receipts" for the merchandise sent on board, and finally a certificate of David H. De Meza and J. Curiel, testifying their knowledge of the destination of the schooner in the following manner. (See the same affidavit produced and proved by the witness Joseph B. Collins above.) A certificate of the governor, acknowledging the validity of the authority and signature of Judge Morgan, is attached to the above-enumerated accounts, and also to the certificate of Messrs. De Meza and Curiel. I also procured and forwarded with the other papers a copy of the New Orleans "Bee" newspaper of 1st September, 1842, containing still the advertisement of the schooner, dated 30th August, 1842, for Curacoa, *via* La Guayra. You will perceive a misprint in the advertisement on the French side of the paper, which perhaps had better be cut off altogether, in order to avoid quibbles. I do hope and trust that the above documents may enable you to recover your insurance; if they do not, I do not know any more what to do in the case. Do me the favor to inform me of the result. The
109 papers altogether forming a considerable package, I am looking out for a private opportunity to forward them to you, and hope to meet with one in a few days. For the expenses of the above documents I request you to give me credit in account with $6 65. I forward New Orleans Saturday Price Current, always a very interesting document, for your information as regards our market. There is a report this day of an earthquake and great destruction at St. Thomas and other West India Islands, which I hope may not be confirmed.

I remain, gentlemen, with every sentiment of esteem, your obed't serv't.

JOHN V. KOLLEMAN.

I had a letter from Mr. Swain, Louisville, 23d February, by Robert Usher, jr., leaving for New York the same day and having shipped his tobacco by Pittsburgh. Present freight from here $7 50 to 8 00 per hhd. tobacco.

STATE OF LOUISIANA, *City of New Orleans:*

Personally before me, Thomas N. Morgan, an associate judge of the city court of New Orleans, came S. P. Brandas, who, having first been duly sworn by me upon the Holy Evangelists, doth depose and say that he came passenger on board the schooner America, with Mr. Vidal, on the voyage from Curacoa, about the beginning of August last. They arrived here on about the 22d day of August, 1842. Said Mr. Vidal was supercargo of the
110 vessel on that voyage, and deponent paid freight for his salt which he had on board on that trip to said Mr. Vidal. That it is to the knowledge of deponent that said Vidal had money with him on board said schooner, which he did purchase in New Orleans, and he cleared from here on board said vessel on the 31st day of August, 1842. He returned in the same schooner in which he arrived or came.

S. P. BRANDAS.

Sworn to and subscribed before me this 17th day of April, 1843.

THOMAS N. MORGAN, *Associate Judge.*

Also at the same time and place came Joseph Curiel, who, being duly sworn, saith that it is within his knowledge that Miguel Vidal came to this port as supercargo of the schooner America, Capt. Anderson, and it is within his knowledge that the said Vidal had within his possession a certain sum of money in gold, for the purpose of purchasing a cargo for the return voyage

of said schooner, and that the cargo was purchased by said Vidal. That deponent knows positively that he had the money, because he changed with said Vidal fifty doubloons of that money.

J. CURIEL.

Sworn to and subscribed before me this 17th day of April, 1843.
THOS. N. MORGAN, *Associate Judge.*

111 STATE OF LOUISIANA, *City of New Orleans:*

Personally before me, Thos. N. Morgan, an associate judge of the city of New Orleans, came Alexander Prieur, who being duly sworn, saith that Mr. Vidal came from La Guayra or Curacoa on board the schooner America, about August, 1842. He brought with him money in gold and silver, with which to purchase cargo for the said schooner America for the voyage on which she cleared from hence on the 31st day of August, 1842.

A. PRIEUR.

Sworn to and subscribed before me this 17th day of April, 1843.
THOS. N. MORGAN, *Associate Judge.*

Mr. David H. De Meza b't of Kelly & Conyngham :

3 hhds. tobacco w'g, viz :

F 619—F	2, 030		
619	1, 950		
	3, 980 — 498 = 3, 482, at $5		$174 10
600	1, 695	212 = 1, 483, at $4	59 32
	205		
Half imp. coop. and sampling 87½			2 63
			236 05

NEW ORLEANS, 26*th August*, 1842.

We hereby certify that the above 3 hhds. tobacco were sold by us to Mr. David H. De Meza and that the amount thereof, say two hundred and thirty six dollars and five cents, was paid to us by the said De Meza in specie, at the time above mentioned.

New Orleans, Feb., 1843.

112 KELLY & CONYNGHAM.
D. CONYNGHAM.

Sworn to and subscribed before me this 2d day of March, 1843.
THOS. N. MORGAN,
Associate Judge of the City Court of N. O.

I, the undersigned, David H. De Meza, do hereby certify that the tobacco expressed in foregoing account has been purchased by me, by order and for account of Mr. M. Vidal and paid for out of his funds, and were shipped on board the Venezuelan schooner America, Capt. Anderson, bound for La Guayra.

New Orleans, 4th March, 1843.

DAVID H. DE MEZA.

Sworn to and subscribed before me this 4th day of March, 1843.
THOS. N. MORGAN.
Associate Judge of the City Court of N. O.

Then follows a bill of parcels of flour, &c., bought of Alexander Prieur, amount to $3,477 55, which being a duplicate of No. 5, produced and proved by Francis Griffin above, is omitted, annexed to it in this instance, however, is the following certificate : I hereby certify that the articles mentioned in

the above bill were sold to Mr. Michael Vidal, of Curacoa, and that
113 the same were shipped by me on board the schooner America, bound for Curacoa, and that the amount thereof, say three thousand four hundred and seventy-seven dollars and fifty cents was paid to me by the said Vidal in specie, at the time above mentioned.

New Orleans, 2d Feb., 1843.

A. PRIEUR.

Sworn to and subscribed before me this 27th day of February, 1843.

THOS. N. MORGAN,
Associate Judge of the City Court.

Then follows a copy of the manifest of the cargo of the America, and the affidavit of M. Vidal annexed, which being a duplicate of No. 6, produced and proved by Mr. Griffin, is also omitted. It has attached to it a certificate of the collector of the port of New Orleans that it is a copy of the original on file in his office, and also the following affidavit:

STATE OF LOUISIANA, *City of New Orleans:*

Personally appeared before me, Thos. N. Morgan, associate judge of the city court of New Orleans, came Alexander Prieur, who, being duly sworn, declares that it is to his personal knowledge that the goods mentioned in the within manifest were on board the Venezuelan schooner America at the time that she cleared from this port on her last voyage, to wit, 31st August, 1842.

A. PRIEUR.

114 Sworn to and subscribed before me this 4th day of March, 1843.

THOS. N. MORGAN, *Associate Judge.*

Mr. M. Vidal to Lindley & Russel, Dr.:

Aug. 27, 1842. 53 barrels prime pork, at $4½..... ..... $238 50

We certify that the articles specified in the above bill were sold by us to Mr. Vidal, and that the amount thereof, say two hundred and thirty-eight dollars and fifty cents, was paid to us by the said Vidal in specie at the time above mentioned.

New Orleans, Feb. 2d, 1843. LINDLEY & RUSSELL.

Sworn to and subscribed before me this 27th day of February, 1843.

THOS. N. MORGAN, *Associate Judge.*

NEW ORLEANS, 26*th Aug.*, 1842.

Mr. M. Vidal, to H. Rodewald:

For 2 hhds. tobacco, P 223, 1,430, E 272, 1,245, 2,675—334 = 2,341, at $5.....	$117 05
Half imp. ch'rge and sample'g.....	1 75
Drayage 5 hhds. to sch'r America.....	3 75
	122 55

I certify that the above 2 hhds. tobacco were sold by me to Mr. M.
115 Vidal, and that the amount thereof, say one hundred and twenty-two 55-100 dollars, is paid to me by the said M. Vidal in specie at the time above mentioned.

New Orleans, 14th Feb., 1843.

HENRY RODEWALD,
By WILLIAM SUTGENS.

Sworn to and subscribed before me this 27th day of February, 1843.

THOS. N. MORGAN, *Associate Judge.*

Then follows another copy of the manifest cargo, which, being a duplicate, is omitted.

Then follows another report and manifest, with the affidavit of William D. Anderson, the master, annexed, which, being a duplicate of No. 12 of the papers produced and proved by Francis Griffin, are also omitted.

These papers are also certified by the collector of the port of New Orleans.

The counsel for the plaintiff then stated that the said plaintiff claimed a verdict for the amount of the insurance recovered by Messrs. Mason & Thompson, with interest, deducting therefrom the items which in the trial in the New York superior court had been allowed to the defendants, such allowance including all items of Mason & Thompson account against McKaighn & Golding for charges and disbursements in reference to the insur-
116 ances in question, and for other premiums of insurance and charges in relation to insurances paid or incurred by them at any time for McKaighn & Golding, and also all items of the account of Mason & Thompson against McKaighn & Golding which accrued after the time when the former received from the latter the order to effect the insurances in question, and the amount of such claim was afterwards agreed upon by the counsel for the respective parties, as follows:

Ap. 8, 1843. Amount collected this day from Sun Mutual Insurance Company:		
Loss	$2,072 32	
Return premium, short interest	15 43	
		$2,087 75
Deduct:		
Insurance per schooner America	167 50	
Interest Dec. 30, 1842, to April 8, 1843, 3 months 9 days	3 23	
Invoice of paper hangings per Hopewell	111 41	
Interest from Octo. 12, 1842, to April 8, 1843, 5 months 27 days	3 82	
Invoice of dentistry per Calais	353 49	
Sundry portages	4 46	
Interest on $357 95 from Octo. 26, 1842, to April 8, 1843, 5 months 13 days	11 34	
Insurance on $4,000 per Michigan	91 25	
Commissions on collecting insurance in suit	105 10	
117 Postages and papers	17 87	
Agent in New Orleans	75 00	
		944 47
		1,143 28
Interest on balance from April 8, 1843, to June 5, 1862, 19 years 1 month 28 days		1,533 44
May 12, 1843. Amount collected this day from Mutual Safety Insurance Company	2,100 84	
Return premium	15 42	
		2,116 26
Interest from May 12, 1843, to June 5, 1862, 19 years 24 days		2,824 50
		7,617 48

And thereupon said plaintiff's counsel called as a witness Joseph Thompson, who, being duly sworn, testified as follows:

I am a deputy marshal; have been so a long time; was so in the year 1852.

A capias ad respondendum in this cause being shown to witness, he said: I received this capias on the second of July, 1852.

Being cross-examined by defendant's counsel, the witness testified: I know that this was received by me on July 2d, because I see the deputation in my handwriting on the back of it.

(Witness reads the deputation to the jury.)

Question by defendant's counsel. Did you not tell me that this was in the handwriting of Mr Tallmadge?

Answer. No; I had not seen the writ when you inquired about it.

118 These papers were generally entered in the process book as they came in. Sometimes this was not done. I can say that I received it on a particular day, because we were in the habit of endorsing the deputation on the same day on which we received the process. I can't explain how it happened that this was not entered on the books. I swear from habit only, not from recollection of this particular paper. I think it is not possible that this should have been received subsequently and antedated. We always deputized on the same day. I think I could not have dated it otherwise than at the true date of reception. It was the duty of the deputy who was present at the time the process was received to enter it in the process book. Thus this book was kept in different hands, and the entry in the book may be in a different handwriting from that of the deputation. I may have been out of the office when this came in, and it may have been left on the desk, and thus not entered.

Being again examined by the counsel for the plaintiff: The deputizing is an official act always done on process.

Samuel L. M. Barlow, the business partner of the counsel for the plaintiff,

119 then stated to the jury, with the consent of defendant's counsel, that it appeared by his register that this action was commenced by the issuing of the original capias ad respondendum on the 2d day of July, 1852, that such entry was made in his own handwriting, and that he was thus certain of the fact.

This statement was accepted by the said counsel for the defendant in lieu of the examination of said Barlow under oath.

The said counsel for the plaintiff then read the charge of his honor Judge Oakley, made to the jury on the former trial of this cause in the superior court, as follows:

His honor the presiding judge charged the jury that having, upon the motion for a non-suit, held that the plaintiff was entitled to sue in his own name alone, without joining Jessurun and Vidal as plaintiffs with him, and that the action was not prematurely brought, it only remained for him to instruct them upon the law applicable to the plaintiff's right to recovery and the defendant's claim to set off their demand against such recovery. And upon these points he charged them that if they believed the testimony, the plaintiff was entitled to recover the proceeds of the policies of insurance effected by the defendants on the return cargo of the schooner America and received by them from the insurers, subject to the usual mercantile charges thereon, and to a deduction of all the items of the defendant's account

120 in evidence before them for premiums of insurance, which the jury shall find the defendants to have paid or been liable to pay for McKaighn & Golding, and subject also to the deductions of all items of the account of the defendants against McKaighn & Golding, given in evidence on the trial, which accrued after the time when defendants received from McKaighn & Golding the order to effect the insurance on the said cargo.

Said counsel for plaintiff also read the opinion of the supreme court in this case, delivered by Edmonds, presiding judge.

N. Y. supreme court.

THOMPSON, plaintiff in error,
vs.
VALARINO, defendant in error.

Edmonds, presiding judge.

There is nothing in the objection that Valarino sued without uniting with him those who had a joint interest with him. It was at best but a secret partnership, in regard to all whose affairs he might sue and be sued alone.

Nor is there any validity in the claim that Thompson & Mason had a right to an allowance for their pre-existing debt against those through
121 whom V. ordered the insurance. The court below went as far as they were authorized to go in allowing them their claim accruing subsequent to the time when they received orders to insure. This could have been done only upon the idea that their subsequent claim might have been created upon the strength of the insurance. But that principle can in no respect aid a prior debt, and there is no authority for their claim upon these funds in that respect.

The only question of any amount in the case is that arising out of the fact of Thompson's being a foreign consul, which is assigned as error in fact.

I suppose the case of Davis *vs.* Packard, in 6 and 7th Peters and in 6 and 10 Ward, is decisive of this question. There it is held that the State courts have no jurisdiction over the person of one who is a foreign consul; that his being such consul may be assigned as error in fact, and that where the fact is established, either by the plea of in nullo est erratum, by confession, default, or otherwise, the court is at once ousted of its jurisdiction, and its judgment, if it has pronounced one, must be reversed.

In the case now under consideration, the fact that Thompson was a foreign consul at the time of the commencement of the suit below was established by the joinder in error, which sets up matters in avoidance only, viz:
122 that he voluntarily submitted himself to the jurisdiction of the State courts.

In the case of Davis and Packard, in 7 Peters, although the determination of the question may not have been material to the decision of that case, yet the court say that this fact would not give jurisdiction, because the privilege is not a personal one of the consul, but of his government, and in the absence of any case showing a ruling otherwise, it seems to me that it will best become us to follow the rule which the Supreme Court of the U. S. have thus indicated to us as that which would be likely to govern them in case the question should come before them. In that case they held that if the court of errors of this State had affirmed the judgment of our supreme court, on the ground that the foreign consul had, by appearing and pleading to the merits in the original suits, waived his privilege, it was error; on that ground we must hold that similar matter of avoidance which is set up in this case cannot be available to sustain the judgment of the court below.

The second matter in avoidance is that Thompson was sued jointly with another who had no such privilege, and the case of Strawbridge *vs.* Curtiss, 3 Cranch, 267, was cited in support of the principle that all the parties, plaintiff or defendant, must be liable to sue or be sued in the Federal courts
123 in order to give them jurisdiction. That case, however, and one or two others on the same principle, were virtually overruled by the United States Supreme Court in 2 How. R., 550, or if not virtually overruled so shaken in their authority as to confine them precisely to analogous cases. The principle will not be extended to cognate cases, and it cannot, therefore, with propriety, control our decision on this point.

We are therefore left with the naked question, unaided by authority, and as the privilege of a foreign consul is not his, but his government's, which he

cannot waive by any default, or by appearing and pleading to the merits, so by parity of reasoning he cannot waive it on his part by contracting jointly with others, nor can a plaintiff avoid it by prosecuting him with others. On these grounds, both the matters of avoidance set up by the defendant in error must be overruled and the judgment of the superior court be reversed.

Plaintiff's counsel then stated that he did not claim that the matters in question in this case were res adjudicata, but that the United States district court sat here to enforce the laws of the State of New York, of which laws this charge and opinion are high evidence.

Plaintiff's counsel further stated that the residence of the defendant, Mr. Thompson, was a part of the record, being set up in the plea of abatement.

124 Plaintiff's counsel here rested his case.

And the said counsel for the defendant thereupon offered in evidence the accounts of Messrs. Mason & Thompson with McKaighn & Golding, as the same were made up in the spring of 1843.

The said accounts are as follows:

Messrs. McKaighn & Golding in account current, La Guayra funds, to 26th October, 1842, with Mason & Thompson:

1842.					
May 18.	To remittance, Anderson on yourselves..... $249 06	$320 40	161	$9 88	
June 4.	To remittance on Roberts & Aullaga..... $325 42	419 60	144	11 60	
16.	To remittance on Roberts & Aullaga..... $535 74	685 74	132	17 37	
	Half proceeds ac. per J. R. Balton, due Sept. 26, '42.....	3, 024 28	30	17 39	
27.	Half proceeds ac. per J. R. Balton, due Oct. 22, '42.....	174 21	4	14	
July 27.	To remittance on Roberts & Au., Aug. 27, $146 96.....	189 04	60	2 17	
	Carry forward.....	4, 813 27		58 55	
Oct. 15.	Half proceeds ac. per America, due Jan. 28, 1843.....	2, 400 60	94	43 28	
	Half proceeds ac. per America, due Sept. 18, 1842.....	814 93	38	5 94	
26.	Balance of interest account.....			57 01	
		8 028 80		221 50	
125 May 25.	By half invoice coffee per T. R. Balton.....	$1, 611 77	154	$47 60	
May 25.	By half invoice coffee, disbursements per J. R. Balton.....	116 11	154	3 43	
31.	Half invoice coffee, do., do.....	4, 446 60	148	126 22	
June 1.	Do., do., disbursements per T. R. Balton.....	34 43	148	97	
Oct. 26.	Interest per contra, in red.....			43 28	
	Balance of interest ac.....	157 01			
	Balance to new account.....	1, 662 88			
		8 028 80		221 50	

To balance due Mason & T., October 26, 1842, $1,662 88.
The above balance transferred to account in New York funds at 28 per cent. discount, $1,299 12.
Errors excepted.
New York, Oct. 26th, 1842. MASON & THOMPSON.

Messrs. McKaighn & Golding in account current, New York funds, to 26th October, 1842, with Mason & Thompson:

1842.				
June 30.	To balance p'r account rendered....	$4,358 98	118	$98 64
July 1.	To acceptance favor Jose Silva, 60 d's, Sept. 2.....	935 09	54	9 68
	Brought forward.....	5,294 07		108 32
21.	To acceptance favor R. Ginning, 60 d's, Sept. 22.....	567 20	34	3 70
Aug. 27.	To ins. per sch. America, due Dec. 30, 1842.....	167 50	65	2 10
126 Oct. 12.	To invoice paper hang's per Hopewell.....	111 41	14	30
Oct. 21.	To invoice dentistry per Calais.....	353 49		
	Sundry portages.....	4 46		
	To int't per contra, in red.....			35 39
	Balance of interest account.....	139 31		
	Balance of account La Guayra funds.	1,299 12		
		7,936 56		147 71
July 15.	By half balance charter party T. R. Balton, June 15.....	$246 64	133	$6 30
Oct. 17.	By half proceeds ac. coffee per T. R. Balton, Nov. 4.....	3,499 25	9	6 04
11.	By half proceeds ac. coffee per T. R. Balton, Mar. 9.....	1,141 51	134	139 25
26.	By interest per contra, in red.....			2 10
	By balance of interest ac.....			139 31
	By balance to new account.....	3,049 13		
		7,936 56		147 71
Oct. 26.	To balance due Mason & Thompson, Oct. 26, 1842.....	$3,049 13	66	$38 59
Dec. 19.	To insurance $4,000 per Michigan, April 22, 1843.....	91 25	112	1 96
31.	To balance of interest.....	36 63		
	Due Mason & Thompson Dec. 31, 1842.	3,177 01		36 63
	1843.			
127 April 25.	To interest on $3,177 01, from Dec. 31, 1842.....	70 07		
		3,247 08		

April 25. By loss per America recovered.....		$4, 203 99	
By less comm'n 5 p. c.....	$210 20		
By portages and papers...	17 87		
By agent in New Orleans..	75 00		
		303 07	
			$3, 900 92

Due McKaighn & Golding April 25, 1843, $653 84.
Errors excepted.
New York, April 25, 1843.

MASON & THOMPSON.

The defendant's counsel then read in evidence a certain letter, addressed by McKaighn & Golden to Messrs. Mason & Thompson, dated 21 November, 1842, as follows:

Duplicate; original per Hopewell.

LA GUAYRA, *November* 21, 1842.

Messrs. Mason & Thompson, New York:

GENTLEMEN: We have to acknowledge receipt of your several favors, 12th, 13th, 13th ulto., per Hopewell, and 15th, 29th, and 31st per Calais, with their inclosures, and note their contents. The sales of 824 bags coffee, per P. R. Belton, we have examined, found correct, and made our entries in conformity. We have also credited your New York account with amount of invoice paper per Hopewell, $111 41, and for invoice of instruments per Calais, $353 49. The paper was received in good order. The instru-
128 ments are not yet landed. We note your remarks respecting them, and doubt not but they will meet the approbation of Dr. Vargas. Our market at present is completely bare of produce. The new crop of coffee has not yet commenced coming in freely. Such as can be obtained is now selling at 8¼ to 8½c. Hides scarce, at 10 to 10½. Indigo, 8¼ to 8½ rs. The market for American produce continues supplied without any improvement in prices. You will please effect insurance on property shipped by the brig Michigan, Capt. J. P. Colman, to the amount of four thousand Spanish dollars. She will sail from here to-day for New Orleans, where she will be detained but a few days, and take in a return cargo for this port. We perceive by the papers that the schooner America cleared at New Orleans on the 1st September, and as yet we are without any account of her.

Yours truly, McKAIGHN & GOLDING.

Defendant's counsel thereupon rested his case.

Defendant's counsel then summed up the case, but, plaintiff's counsel being about to sum up the case for the plaintiff, was stopped by the presi-
129 ding judge, who enquired from the defendant's counsel whether there was any question of fact in the cause which he desired to have submitted to the jury, suggesting that it appeared to him there were but two questions of fact open; but the defendant's counsel replied that he did not desire to go to the jury upon those questions, as he considered the evidence upon them to be against him, and that all the questions were properly to be disposed of as questions of law, by instructions from the court to the jury.

The counsel for the defendant then requested his honor the presiding judge to charge the jury as follows:

1. That this action cannot be maintained for want of the proper parties, Sidney Mason having been shown to be a general partner of the defendant

at the time of the transactions in question, and not being joined as a defendant.

2. That if any cause of action accrued to the plaintiff, it accrued in the year 1843, and this action was not commenced until July 2d, 1852, and that during that whole period Sidney Mason and the defendant, William D. Thompson, were residents and citizens of the city of New York, and therefore by the operation of the statutes of limitation of the State of New York, so far as the same are held to govern the bringing of suits in this court, this action is too late.

130 3. That the bringing of an action for the same cause in a State court in the year 1843 furnishes no ground for delay in bringing the present action in a U. S. court.

4. If the court should be of opinion that this action lies, the defendant had a right to deduct or set off from the amount received by his firm the balance of account due them from McKaighn & Golding, at the time of the payment of the loss.

And his honor the said presiding judge did refuse so to charge, but did charge as hereinafter stated.

And to each of said refusals to charge the defendant, by his said counsel, did then and there duly except.

And the said presiding judge did then proceed to charge the jury as follows:

There seem, then, to be but three questions remaining. The first is the defendant claims that this action cannot be maintained for want of the proper parties. Sidney Mason having been shown to be a general partner of the defendant at the time of the transactions in question, and not being joined as a defendant, that question is not now properly before this court.

131 It has once been presented before the court, another judge presiding, in a plea in abatement, and been overruled. The question now comes before this court upon its merits. This question of parties is not, therefore, legitimately now before it, and if presented it cannot be expected that sitting on the trial I should overrule Judge Betts.

The second is that if any cause of action accrued to the plaintiff, it accrued in the year 1843, and this action was not commenced until July, 1852, and that during that whole period Sidney Mason and the defendant, Wm. D. Thompson, were residents and citizens of the city of New York, and therefore by the operation of the statutes of limitation of the State of New York, so far as the same are held to govern the bringing of suits in this court, this action is too late. This request I understand to be based upon this position, that the suit brought in the State court was improperly brought, as the defendant, Thompson being a consul of a foreign government, could not be sued in any court except the Federal courts. That the State courts having no jurisdiction, the bringing of the suit in those courts did not have the effect to keep the right of action alive. I think that would be giving a very unjust construction to the statute, one which would operate very

132 inequitably; and therefore I think this prayer ought not to be maintained. It appears from the papers submitted to the court that the suit brought in the superior court of this city; that there that question was not mooted, and there is nothing tending to show that it was known. Certainly it was not raised. Now if the suit had by any accident remained in the supeior court until after the six years had expired, it would be very unjust to the plaintiff, if he had a legal claim, to say that because he was ignorant of the peculiar position of the defendant as a consul he had lost his right. I think no court can be disposed to give such a construction to that proceeding. I think, therefore, the exception in the New York revised statutes, to which the court has been referred, covers this case, and that the

pendancy of this cause of action in that court did have the effect to prevent the statute of limitations from running, and the party had a year after the action ended to commence this suit. That answer also embraces the third request to charge in relation to the statute of limitations. The court must take the record of the case as presented. If there has been any improper addition to the record, or substraction from it, or change in it, the party must go to the court whence the record issued. It is well settled that courts have entire control over their own records, nor has any court
133 the right in a collateral way to inquire into the correctness of the record of another court. If any fault is found in the record or in a duly authenticated copy of it, it is the duty of the party making the complaint go to the court ordering the record, and have it corrected there. Therefore the court must take it that the proceeding in the State court was not ended until the second day of July, 1851. It is unquestionably true that there are many authorities—well considered cases—where opinions have been pronounced by able judges, that in cases of that description the day must be included; but a very thorough examination of the subject was made by myself within the last two years, after a full argument, and I then came to the conclusion that the day is to be excluded, and I saw nothing in the many authorities to which I was then referred, but not presented here, together with the authorities presented here, to change that conclusion. I think an examination of the subject will show that the more modern authorities, both English and American, are that the day is to be excluded; that all the old learning as to the nice distinctions between the date and the day of the date is abrogated. I think those old authorities are not followed by the courts in this country, unless it is in the courts of Massachusetts. Certainly the supreme court of my own State, (Vermont,) after a full examination, have taken a different view of it—one that I deem correct, and feel con-
134 strained to take at the present time. Therefore, if the testimony of Mr. Thompson is to be regarded as correct, the capias in this case was issued or put into the marshal's office on the second day of July, 1852, and the statute of limitations is saved by a day. I dispose of that question as a question of law. The other question is an important one in commercial law, about which there has been great discrepancy in authorities, and very learned opinions will be found from different courts, giving different constructions to the law, that is whether a factor has a right to hold on to funds in his own hands for a general balance, as against a principal who was not made known to the factor at the time he received the money. In this case the evidence tends to show that at the time this money was received there was at least reason to suspect, if not to know, that Mr. Valarino had some claim upon it, and that McKaighn & Golding were not entitled to this insurance money; but I am not disposed to turn it upon that ground. I should perhaps be very much at a loss as to what disposition to make of this question if it had not been decided by the judicial tribunals of this State, and by one court of acknowledged learning and ability in all commercial law. The old superior court of this city, not meaning to speak differently of the court as now constituted, but the old superior court,
135 when Chief Justice Jones presided, and with his associates, was a very able court, and in relation to all commercial matters its decisions were regarded, I suppose in New York, but certainly out of New York, as high authority. This question seems to have been before them, and in this case, and it was undoubtedly discussed with ability, and authorities produced, and they have passed upon it satisfactorily to them. That decision I regard as high authority, although not perhaps absolutely controlling. Even if I had an opinion adverse to it, I should very reluctantly overrule the decision of that court upon such a question, particularly one so fully

considered. In addition to that, it was taken from the superior court to the supreme court of the State, and the opinion of that court, pronounced by Judge Edmonds, indicates that they thought the superior court had been sufficiently liberal in allowing the offsets of those items against McKaighn & Golding, which accrued after Mason & Thompson received the money. I am therefore disposed to instruct the jury in this case, following the opinion of the superior court and of the supreme court of New York, that this general balance that Mason & Thompson had against McKaighn & Golding cannot be offset. The jury will therefore return a verdict for the plaintiff, the amount by consent to be agreed upon by the parties.

136 And to the direction of said presiding judge to the jury, to bring in a verdict for the plaintiff, and to such charge, and every portion thereof, except the decision of the said judge that there was no question of fact for the jury, the defendant, by his said counsel, did then and there duly except. And because none of the said exceptions so offered and made to the opinions and decisions of the said district judge do appear upon the record of the said trial, therefore on the prayer of the said defendant, by his said counsel, the said district judge hath to this bill of exceptions set his seal according to the statute in that case made, this day of , one thousand eight hundred and sixty-two.

[SEAL.] (Signed) D. A. SMALLEY.

Endorsed: U. S. district court. 356. Augustin Valarino *against* William D. Thompson, consul. Bill of exceptions. Emerson & Prichard, att'ys for def't. Filed 12th Nov., 1862.

137 UNITED STATES OF AMERICA, *ss:*

To Augustin Valarino, greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States, to be held at the city of New York, in and for the southern district of New York, on the first Monday of April next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the said southern district of New York, wherein William D. Thompson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-fourth day of October, in the year of our Lord eighteen hundred and sixty-two.

(Signed) SAM. R. BETTS.

SOUTHERN DISTRICT OF NEW YORK, *to wit:*

Duncan Smith, being duly sworn, says that he did, on Tuesday, the twenty-eighth day of October, 1862, serve the defendant in error Augustin

138 Valarino with the foregoing citation by showing the same to Jeremiah Larocque, one of the members of the firm of Larocques & Barlow, attorneys for said Augustin Valarino in the district court, and delivering to him at the same time a copy of said citation.

DUNCAN SMITH.

Subscribed and sworn to before me this 28th Oct., 1862.

R. E. STILWELL, *U. S. Com'r.*

Endorsed: 356. United States circuit court. William D. Thompson, pl'ff in error, *vs.* Augustin Valarino, def't in error. Citation. Emerson & Prichard, att'ys for pl'ff in error.

Filed 28th October, 1862.

Bond.

139 Circuit court of the United States of America for the southern district of New York, in the second circuit.

WILLIAM D. THOMPSON
vs.
AUGUSTIN VALARINO. } In error.

Know all men by these presents that we, Sidney Mason and William D. Thompson, both of the city of New York, are held and firmly bound unto the above-named Augustin Valarino in the sum of ten thousand dollars, to be paid to the said Augustin Valarino, his executors or administrators, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and sixty-two.

Whereas the above-named William D. Thompson hath prosecuted a writ of error to the circuit court of the United States for the southern district of New York, in the second circuit, to reverse the judgment rendered in a suit of the said Augustin Valarino against the said William D. Thompson by the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the
140 above-named William D. Thompson shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

SIDNEY MASON. [L. S.]
WM. D. THOMPSON. [L. S.]

Sealed and delivered in the presence of—
WM. EMERSON.

I approve the within sureties as sufficient security for the payment of the sum of ten thousand dollars within mentioned.

New York, October 25, 1862.
(Signed) SAM. R. BETTS, *U. S. Judge.*

Filed this 28th day of Oct'r, 1862.

141 U. S. circuit court for the southern dis't of New York, in the 2d circuit.

WILLIAM D. THOMPSON, pl'ff in error,
v.
AUGUSTIN VALARINO, def't in error.

The clerk of the district court of the United States for the southern district of New York having, in making his return to the writ of error issued in this cause, omitted to attach to said writ his certificate certifying to said return as required by the rules and practice of the court, it is hereby stipulated that the said writ and return may be taken from the files of this court to enable said clerk to attach thereto such certificate, and that the clerk of said district court now attach to said writ and return the requisite certificate
nunc pro tunc as of the date when said return was originally filed,
142 and return the same to the clerk of this court without prejudice to the proceedings had in this cause, and with like effect in all respects as if said certificate had been attached when said return was originally filed,

and that upon filing this stipulation the proper orders be entered to give the same effect.

New York, July 27, 1864.

BOWDOIN, LAROCQUES & BARLOW,
Att'ys for Def't in Error.
EMERSON & PRICHARD,
Att'ys for Pl'ff in Error.

Endorsed: U. S. circuit court. W. D. Thompson, pl'ff in error, *vs.* Augustin Valarino, def't in error. Stipulation. Bowdoin, Larocque & Barlow, att'ys for def't in error.
Filed Aug. 1, 1864.

143 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Wednesday, the 31 day of August, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable Samuel Nelson, associate justice of the Supreme Court United States.

WILLIAM D. THOMPSON, pl'ff in error,
v.
AUGUSTIN VALARINO, def't in error.

On filing a consent signed by Emerson & Prichard, att'ys for pl'ffs in error, and on their motion it is ordered that the said writ and return may be taken from the files of this court and transmitted to the clerk of district court for this district to enable said clerk to attach thereto a certificate certifying to said return as required by the rules and practice of the court, and that the said clerk now attach to said writ and return the requisite certificate nunc pro tunc as of the date when said return was originally filed and return the same to the clerk of this court without prejudice to the
144 proceedings had in this cause, and with like effect in all respects as if said certificate had been attached when said return was originally filed.

S. NELSON.

Endorsed: U. S. circuit court. W. D. Thompson, pl'ff in error, *vs.* Augustus Valarino, def't in error. Order.
Filed Aug. 31, 1864.

144½ UNITED STATES OF AMERICA, *Southern District of New York, ss:*

WILLIAM D. THOMPSON, pl'ff in error,
v.
AUGUSTIN VALARINO, def't in error.

I, George F. Betts, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate are true copies of the records in my office, and all proceedings in the above-mentioned cause, including the bill of exceptions signed therein.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this eleventh day of February, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the said United States the eighty-seventh.

GEO. F. BETTS, *Clerk.*

145 And now at this day, to wit, on the first Monday of April, in the year one thousand eight hundred and sixty-three, before the judges of the said court of the United States for the southern district of New York, in the second circuit, now here comes the said William D. Thompson, by Emerson & Prichard, his attorneys, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid and the matters therein contained are not sufficient in law for the said Augustin Valarino to have or maintain his aforesaid action thereof against the said William D. Thompson; there is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in the form aforesaid given, was given for the said Augustin Valarino against the said William D. Thompson, whereas by the law of the land the said judgment ought to have been given for the said William D. Thompson against the said Augustin Valarino.

And the said William D. Thompson prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and
146 that he may be restored to all things which he has lost by occasion of the said judgment, &c.

And herein the said Augustin Valarino, by Bowdoin, Larocques & Barlow, his attorneys, freely comes here into court and says that there is no error, either in the record or in the proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the said circuit court of the United States for the southern district of New York, before the aforesaid judges thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

But because the said court, before the aforesaid judges thereof, now here, are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, before the said judges, at the United States court buildings in the city of New York, in the said southern district of New York, on the first Monday of April, in the year one thousand eight hundred and sixty-four, to hear judgment thereon, for that the said court now
147 here are not yet advised thereof, &c. At which day, before the judges of the circuit court of the United States aforesaid, at the United States court building in the city of New York, in the said southern district of New York, come the parties aforesaid, by their attorneys aforesaid, whereupon, as well the record and proceedings aforesaid and the judgment given in form aforesaid as the matters aforesaid, by the said William D. Thompson above, for error assigned being seen, and by the said circuit court of the United States, before the aforesaid judges thereof, now here, fully seen and understood, and mature deliberation being thereupon had, it appears to the said court, before the aforesaid judges thereof, now here, that there is no error, either in the record and proceedings aforesaid, but that the said judgment aforesaid should be in all things affirmed.

Therefore it is considered that the judgment aforesaid, in form aforesaid given, be in all things affirmed and stand in full force and effect, the several matters above for error assigned in anywise notwithstanding. And it is further considered that the said Augustin Valarino do recover against
148 the said William D. Thompson, as well his damages, costs, and charges adjudged to him by the said judgment aforesaid, as also one thousand one hundred and ninety-five dollars and ninety-six cents, adjudged to him by the said circuit court of the United States for the southern district of New York, in the second circuit, before the aforesaid judges thereof, now here, for his damages, costs, and charges, which he hath sustained and expended by reason of the delay of execution of the judgment aforesaid, and

on pretence of the prosecution of the said writ of error, which said damages, costs, and charges in the whole amount to nine thousand one hundred and seventy-eight dollars and eighty-two cents, and that the said Augustin Valarino have execution thereof, &c. And the said William D. Thompson in mercy, &c.

Judgment signed this 15th September, 1864.

R. E. STILWELL, *De'y Clerk.*

Endorsed: U. S. circuit court, south'n dist. of N. Y., 2d circuit. Augustin Valarino, def't in error, ads. Wm. D. Thompson, pl'ff in error. Judgment record. Bowdoin, Larocques & Barlow, att'ys for def't in error.

Filed Sept. 16, 1864.

149 Supreme Court of the United States of America.

WILLIAM D. THOMPSON, pl'ff in error } In error.
vs.
AUGUSTIN VALARINO, def't in error. }

Know all men by these presents that we, William D. Thompson, of the city of New York, and Theodore Bailey Myers, of Yonkers, Westchester County, New York, are held and firmly bound unto the above-named Augustin Valarino in the sum of fifteen thousand dollars, to be paid to the said Augustin Valarino, his executors or administrators, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 16th day of July, in the year of our Lord one thousand eight hundred and sixty-four.

150 Whereas the above-named William D. Thompson hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of New York, in the second circuit: Now, therefore, the condition of this obligation is such that if the above-named William D. Thompson shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

WM. D. THOMPSON. [SEAL.]
T. BAILEY MYERS. [SEAL.]

Sealed and delivered in presence of—
SAM. R. BETTS.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

William D. Thompson, being duly sworn, doth depose and say that
151 he resides in the city of New York, and that he is worth the sum of fifteen thousand dollars over and above all his just debts and liabilities.

Sworn to this 19th day of July, A. D. 1864, before me.

SAM. R. BETTS.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

T. Bailey Myers, being duly sworn, doth depose and say that he resides in Yonkers, Westchester County, and is worth the sum of fifteen thousand dollars over and above all his just debts and liabilities.

T. BAILEY MYERS.

Sworn to this 19th day of July, A. D. 1864, before me.

SAM. R. BETTS.

I certify that the sureties to the above bond well known to me, are sufficient guarantees for the satisfaction of the same.

N. Y., July 19, 1864.

SAM'L R. BETTS.
Judge of the United States for the Southern District of N. Y.

152 Endorsed: U. S. Supreme Court. W. D. Thompson, pl'ff in errror, *v.* Augustin Valarino, def't in error. Bond for costs and damages on writ of error. Emerson & Pritchard, att'ys for pl'ff in error.

Approved. SAM. R. BETTS.

Filed July 21, 1864.

153 By the Honorable Samuel R. Betts, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Augustin Valarino:

Whereas William D. Thompson lately issued out of the Supreme Court of the United States a writ of error, directed to the circuit court of the United States for the southern district of New York, stating that in the record and proceedings, as also in the rendition of the judgment, of a plea in the said court, before the judge thereof, between the said William D. Thompson, plaintiff in error, and you, the said Augustin Valarino, defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, to be holden at the Capitol, at the city of Washington, on the first Monday of Dec'r next. You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of Dec'r next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 20th day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eigthy-ninth.

SAM. R. BETTS.

154 Endorsed: U. S. Supreme Court. Wm. D. Thompson, pl'ff in error, *vs.* Augustin Valarino, def't in error. Citation. Emerson & Prichard, att'ys for pl'ff in error.

Due service of a copy of within is hereby admitted.
July 22, 1864.

BOWDOIN, LAROCQUE & BARLOW, *Def'ts Att'ys.*

Filed July 28, 1864.
Filed in Supreme Court December 12, 1864.

Supreme Court of the United States.

AUGUSTIN VALARINO, DEFENDANT IN ERROR,

ads.

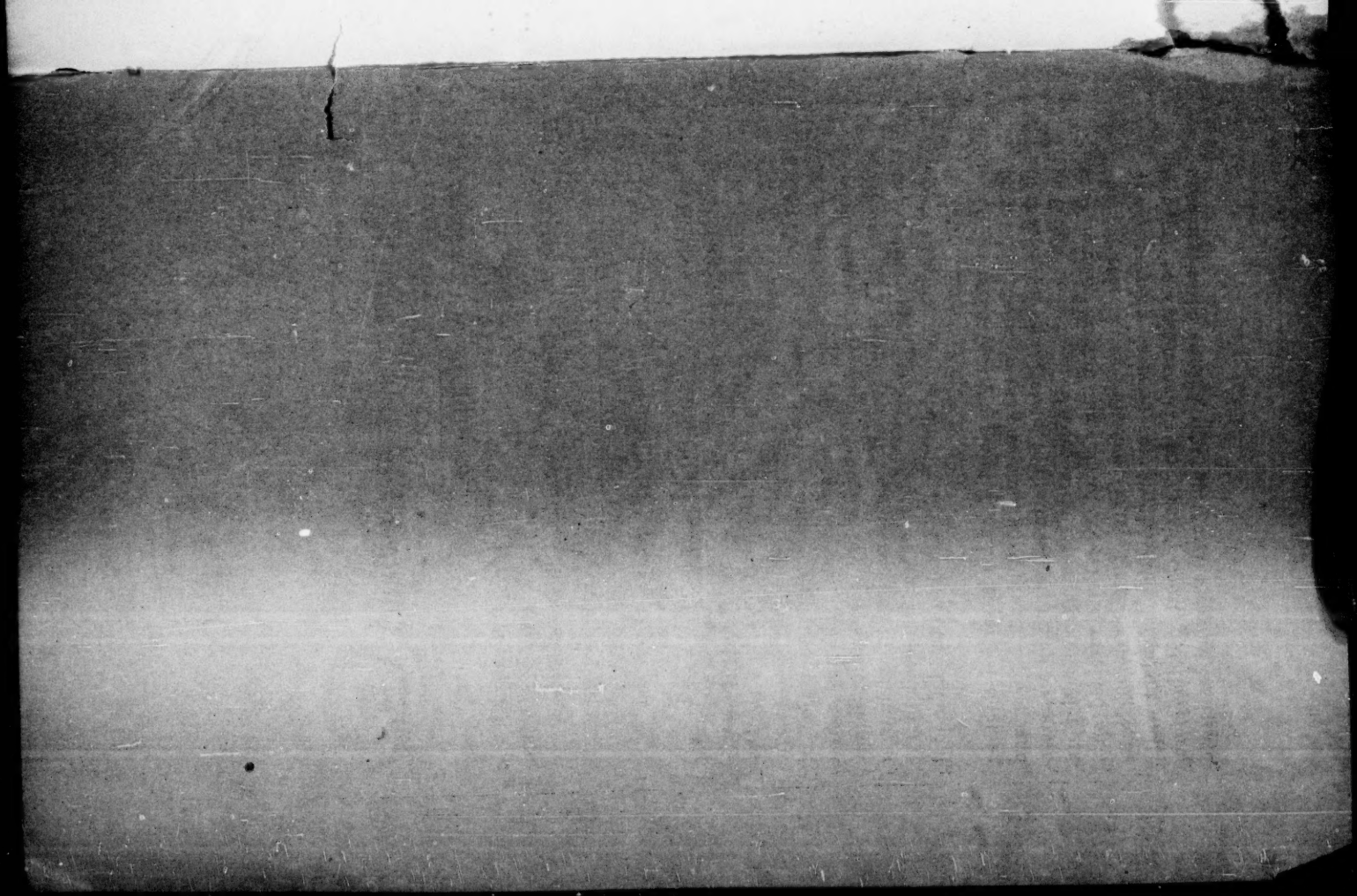
WILLIAM D. THOMPSON, PLAINTIFF IN ERROR.

Brief for Defendant in Error.

JERE. LAROCQUE, *Of Counsel.*

New-York:
JOHN W. AMERMAN, PRINTER,
No. 47 CEDAR STREET.

1867.



Supreme Court of the United States.

AUGUSTIN VALARINO, Defendant in Error, *ads.* WILLIAM D. THOMPSON, Consul, &c., Plaintiff in Error.	*Statement and Points for Defendant in Error.*

STATEMENT.

This is a writ of error to the Circuit Court of the United States for the Southern District of New-York, to review a judgment affirming one of the District Court in that District, in which latter court Valarino sued Thompson, (a consul,) on the common law side of the court, in an action of assumpsit, on the common money counts. Thompson first pleaded in abatement the non-joinder of his copartner, Sidney Mason. The pleadings in abatement resulted in a demurrer to the rejoinder, upon which judgment was rendered by the court in favor of the plaintiff, with liberty to the defendant to answer over. (Fols. 8 to 12.)

To the latter plea the plaintiff, by leave, replied double; first, taking issue on the plea, and next, (under a provision of the New-York statute of limitations,) setting up an action and judgment in his favor, on the same cause of action, in the Superior Court of the City of New-York, reversed on a writ of error in the Supreme Court of the State of New-York, assigning as error in fact, that the defendant was a foreign consul when sued in the Superior Court, and, therefore, not liable to be sued in that court, and a capias was issued

in the United States District Court for the Southern District of New-York, where the defendant resided, within one year after such reversal, continued by *alias* and *pluries*, on which latter writ the defendant was taken. (Fols. 13 to 25.)

To the last replication the defendant rejoined, taking issue on the single fact only of the issuing of the capias in the District Court within one year after the reversal of the judgment in the State Court. (Fol. 25.) The plaintiff joined in this issue. (Fol. 25.)

On the trial below the record from the State court was produced, by which the reversal there of the plaintiff's judgment was shown to have been on the 2d July, 1851. (Fols. 32 to 49. See particularly fol. 47.) The capias was shown to have been issued from the District Court on the 2d July, 1852. (Fols. 49 to 51; 117 to 119.)

Upon this the defendant's counsel raised the point, that the reversal in the State court having been on the 2d July, 1851, the action commenced in the United States District Court on 2d July, 1852, was one day too late.

Upon the merits, the action was for the recovery of the proceeds of two policies of insurance, collected by the defendant's firm of Mason & Thompson, from the underwriters, under the following circumstances:

M'Kaighn & Golding, living in Laguayra, South America, on the 10th August, 1852, ordered Mason & Thompson, (the defendant's firm,) in New-York, to effect insurance on a cargo to be shipped by the schooner America, from New-Orleans to Laguayra, to the amount of $5,500. (Fol. 106.) Mason & Thompson did so, by two policies. The vessel having been lost on the voyage, they collected the money from the insurers. (Fols. 56, 60 to 62.) M'Kaighn & Golding were indebted to them at the time in a balance of account amounting to a few hundred dollars less than the sum so received, part of which had accrued before, and part after their receipt of M'Kaighn & Golding's order to effect the insurance in question. (Accounts, fols. 123 to 128.)

In point of fact, M'Kaighn & Golding, in giving the order to effect the insurance, acted not on their own account, (hav-

ing no interest in the adventure,) but on account of the present plaintiff, Valarino, who then resided in Curaçao; and whose order to M'Kaighn & Golding for the same insurance is in the case. (P. 40, fol. 105.)

M'Kaighn & Golding became insolvent, and Mason & Thompson were unable to collect their debt from them. They thereupon claimed a lien upon the insurance money for the amount of their debt.

At the close of the trial, the defendant's counsel expressly disclaimed there being any question of fact for the jury to pass upon, but presented prayers for instructions to be given by the court to the jury, which the court declined to give; and the defendant's counsel excepted. The court gave the instructions contained in the case. (Fols. 129 to 137.)

The jury accordingly found for the plaintiff for the amount of insurance collected by Mason & Thompson, with interest, less the usual commercial charges, deducting all items of the latter's account against M'Kaighn & Golding which accrued after their receipt of the order to effect the insurance, and also allowing all insurance items in their account. (See statement of verdict, fols. 116, 117; verdict, fol. 28.) The defendant thereupon sued out a writ of error to the Circuit Court, where, after argument and due deliberation, the judgment of the District Court was affirmed, with costs. He thereupon brought error to this court.

Point I.

The judgment of the District Court, on the demurrer, in which the pleadings in abatement terminated, was not reviewable on error, in the Circuit Court, and is not in this court; but is final and conclusive.

1. It makes no difference whether that judgment was founded upon the insufficiency of the plea or of the rejoinder. It was, in either case, equally, (if error at all,) "error in ruling a plea in abatement." It is the whole subject of such merely dilatory pleas

which the statute excludes from the jurisdiction in error.

2. If it did make any difference, the plea in abatement was itself bad for the reasons shown in the plaintiff's XIVth Point on the demurrer in the court below. (See Appendix to these Points.)

3. If it proceeded upon the insufficiency of the rejoinder, the judgment on the demurrer below was equally correct. (See Appendix.)

4. The objection taken by the plea did not go at all to the jurisdiction of the court, but only in abatement of the suit. There was no dispute that the court had jurisdiction of *the suit as it was brought*, viz., by Valarino against Thompson. Afterwards, by the rejoinder, the defendant attempted to take the ground that the suit *might* have been brought, as he claimed it *ought to have been* brought, against Mason and Thompson, in another court, which was a clear departure from the ground taken in the plea that it was *ill-brought* against Thompson alone in the District Court, but left the plea none the less what it had originally been, a mere plea in abatement of defect of parties, and not a plea to the jurisdiction.

1 *U. S. Statutes at Large*, pp. 84, 85, sec. 22 of the Judiciary Act of 1789.

Point II.

The objection taken by the plea in abatement of the non-joinder of Sidney Mason, the alleged co-promissor with the defendant, was not available to the defendant on the trial. That objection can be taken in no other way than by plea in abatement. It had, moreover, been so taken and overruled.

1 *Chitty on Pleading*, 52, (original paging,) and notes.

Point III.

It follows that the defendant's first prayer for instructions was properly denied. (Fol. 129.)

Point IV.

In computing the time within which an action must be brought in the State of New-York, to avoid the bar of the statute of limitations, the day from which the computation is made is to be excluded, and the day on which the action is commenced included, and this is the *lex fori* which governs the question in the courts of the United States.

Cornell *vs.* Moulton, 3 *Denio* (*N. Y.*) *R.* 12, and cases cited.
Homan *vs.* Liswell, 6 *Cowen*, 659.
Ex parte Dean, 2 *Cowen*, 605.
M'Elmoyle *vs.* Cohen's Adm'r, 13 *Peters*, 312, at page 327.

Point V.

In applying the bar of a statute of limitations in such a case, the courts of the United States simply adopt the State statute "as a rule of decision." Inasmuch, therefore, as the New-York statute, in question, allows one year for the commencement of a new action, after a judgment in favor of the plaintiff reversed on error, that part of the statute forms equally "a rule of decision" in the Federal court as the prescribed limitation itself.

1 *U. S. Statutes at Large*, p. 92, sec. 34 of the Judiciary Act.
1 *Revised Statutes of New-York of* 1830, p. 295, marginal paging, sec. 18; *Ibid.* p. 298, sec. 33; p. 299, sec. 38.
New-York Code, secs. 73, 89, 91, 99, 104.
Harpending *vs.* The Dutch Church, 16 *Peters*, 456.

Point VI.

It is no answer to say that the judgment in the State court was reversed for want of jurisdiction. The case was equally within the letter and spirit of the act. It was nevertheless a judgment in favor of the plaintiff, not void, but good until reversed in error, and rendering a writ of error necessary to get rid of it. Nor did the fact of the presence of Mason as a party defendant, named in that judgment, make any difference.

In fact, neither of these objections was open to the plaintiff in error on the trial; his rejoinder to the special replication setting up the former judgment reversed on error, having taken issue only on the single fact of the commencement of the action within one year after the former judgment was reversed. (Fol. 25.)

Point VII.

The second and third prayers for instructions were therefore properly denied. (Fols. 129, 130.)

Point VIII.

As to the lien on the proceeds of the policies claimed by the defendant against M'Kaign & Golding, the rule laid down by the learned judge, on the trial, was the same which had been settled by the Superior Court of the City of New-York in this case, and affirmed by the Supreme Court of the State of New-York, on the writ of error, as having gone at least as far as the defendant could claim, viz.:

"That the plaintiff was entitled to recover the proceeds "of the policies * * * subject to the usual mercantile "charges thereon, and to a deduction of all the items of the "defendant's account in evidence before them, for premiums "of insurance, which the jury should find the defendant to

" have paid, or been liable to pay for M'Kaighn & Golding,
" and subject also to the deduction of all the items of the
" account of the defendant against M'Kaighn & Golding,
" given in evidence on the trial, which accrued after the
" time when defendant received from M'Kaighn & Golding
" the order to effect the insurance on the said cargo."

Judge Oakley's charge, on trial in Superior Court, fol. 119.

Affirmed by full bench Superior Court, Oct., 1845, fol. 42.

Approved by Supreme Court, on writ of error, p. 46, fol. 120.

Judge Smalley's charge in District Court, fols. 134, 135.

Mr. Justice Nelson's opinion in Circuit Court.

I. The decided preponderance of authority, in the English cases and text writers, is against the lien of an insurance broker for the general balance of his account, constituting a pre-existing debt, under circumstances like the present. Even those which, at first blush, appear to support that view, on close examination will be found not necessarily to do so.

Lanyon *vs.* Blanchard, 2 *Camp.* 597.
Weldon *vs.* Gould, 3 *Espinasse*, 268.
Houghton *vs.* Matthews, 3 *Bos. and Pul.* 485.
Baring *vs.* Corrie, 2 *Barn. and Ald.* 137.
Dixon *vs.* Stansfeld, 11 *Eng. Law and Eq.* 528.
Park on Ins. 523, note *b.*
1 *Condy's Marshall*, 301.
Cross on Lien, 260, 277, (orig. paging,) 18 *Law Lib. N. S.* 172, 182.
Smith's Merc. Law, 340. (1 *Law Lib. N. S.* 202.)

II. English judges and text writers, moreover, have spoken and written in reference to the course of

business between insurance brokers, acting exclusively as such, and assurers and assured, as it is known and exists in England, which is entirely different from what prevails in this country. There it is a distinct office, the duties of which include procuring subscriptions to policies, holding them, adjusting and settling losses, receiving and paying over the money. The assured, being often within a stone's throw of the underwriters, never sees them. Here, also, we have insurance brokers, properly so called, but whose functions include no such range of duties. They are mere middle-men, as other brokers. Much, therefore, in the English authorities, is inapplicable to agents effecting insurances, not as general brokers, but as merely incidental to a general commercial correspondence. It is owing to this difference in England between the duties of insurance brokers and of other brokers, that the former alone enjoy the benefit of a lien.

Russell on Factors and Brokers, 193 and 194, and cases cited; (32 *Law Library, N. S.* 127, 128.)

III. It is indispensable to the lien for the general balance of accounts, that it should have accrued in the same character in which the property or the funds were received on which the lien is claimed.

Welden *vs.* Gould, 3 *Espinasse R.* 268.
2 *Kent's Com.* 640.
Bryce *vs.* Brooks, 26 *Wend.* 376, per Verplanck, Sen.
S. C. 21 *Wend.* 14.
Park on Insurance, 543, note *b.*
1 *Condy's Marshall*, 301.
Cross on Lien, 277, (orig. paging,) 18 *Law Library, N. S.* 182.
Dixon *vs.* Stanfeld, 11 *Eng. Law & Eq. R.* 528.
M'Kenzie *vs.* Nevins, *Sheph. R.* 138.
Reed *vs.* Pacific Ins. Co. 1 *Metc. R.* 166.

IV. The policies on the cargo of the America were effected by Mason & Thompson, and their proceeds received by them, neither in the capacity of insurance brokers, nor in that of factors for M'Kaighn & Golding; in which latter relation it is claimed by the defendant that the general balance of their account against them accrued, but in that of general agents or commercial correspondents, upon a distinct and independent employment. They therefore had no lien for the general balance of the account.

V. Mason & Thompson's relation to M'Kaign & Golding, as insurance brokers, if they ever did become invested with that character, did not commence until the receipt of the order to effect the insurances in question; which, for all purposes of this case, may be assumed to have been the 27th August, 1842, when they effected the insurances; no other item of their account intervening between that and the date of the letter of M'Kaighn & Golding ordering them, viz., 10th August, 1842. (Fol. 125.)

VI. The rule is equally well settled that the lien, whether of factors or insurance brokers, does not extend to any items anterior to the date when that relation commenced. This rule would also exclude the general balance of account not allowed to the defendant.

Houghton *vs.* Matthews, 3 *Bos. & Puller*, 485.
Smith's Merc. Law, 340, 1 *Law Library*, *N. S.* 202.
Cross on Lien, 260, (orig. paging,) 18 *Law Library*, *N.S.* 172.
Sturgis *vs.* Slacum, 18 *Pickering*, 36.
Robinson *vs.* Frost, 14 *Barbour*, (*N.Y.*) *Rep.* 576.

VII. Mason & Thompson and M'Kaighn & Golding were in fact partners in the transactions out of which the general balance claimed arose. They could have no lien as partners for the balance of a partnership account, upon securities in their hands, either as factors or insurance brokers. (See accounts, fols. 124 to 128.)

VIII. The policies on their face were "for account of whom it may concern," thus showing express notice to Mason & Thompson that others than M'Kaighn & Golding might be the owners. After they were effected, the chances were 100 to 3 against the loss occurring, or Mason & Thompson having any thing to collect under them. They being the property of a stranger, the most that Mason & Thompson can claim is an indemnity for any loss sustained through reliance upon them; and so bare was the case of any evidence of such loss, or of any reliance upon them, in respect to the general balance accrued before the order to effect the insurance was received, that their counsel did not even ask to have the question submitted to the jury.

Rogers *vs.* Traders' Insurance Co. 6 *Paige* (*N. Y.*) *Ch. R.* 583, at p. 598.
Wilmerding *vs.* Hart, *Lalor's Sup. to Hill & Denio's Rep.* 305.
Clark *vs.* Merchants' Bank, 1 *Sandf. N. Y. Superior Court R.* 498, at p. 507.
Reversed, 2 *Comstock*, 380, but on a different point.
Arnold *vs.* Clark, 1 *Sandf. S. C. R.* 491.

IX. The case of Swift *vs.* Tyson, 16 *Peters*, 1, so much relied upon by the defendant, has no application to this case. It relates solely to negotiable commercial paper, and to equities claimed to excuse a party to such paper from its payment, as between him

and a subsequent holder. It has no relation, even in cases of commercial paper, to a conflict of title between different parties, claiming to be the owners, or sought by the actual owner to be treated as prior owners, for the purpose of establishing a derivative title, nor to a case where the holder *had notice* of the equity. Much less does it apply to the case of a mere *chose* in action, such as a policy of insurance, or to such a conflict of title to a *chose* in action; the policy in this case showing on its face, moreover, notice to the defendant, that the ownership might as well be in any other person as in M'Kaighn & Golding, and thus putting him on his guard against trusting to it.

X. Even as to commercial paper, that case is not authority for the rule that the holder, by a transfer, *as mere security* for an antecedent debt, is protected against the equities between the debtor and his immediate transferee. What was said by Mr. Justice Story, in delivering the opinion of the court on that subject, was purely *obiter*, the case being one of a taking in actual payment, and not as security, and Mr. Justice Catron, in concurring, put in an express protest to that effect.

See, also, Stalker *vs.* M'Donald, 6 *Hill*, 93.
Boyd *vs.* Cummings, 17 *N. Y. Rep.* 101.

Point IX.

For the foregoing reasons the defendant's fourth prayer for instructions was properly denied. (Fol. 130.)

Point X.

The copy of a letter from M'Kaighn & Golding to John S. Manson, offered in evidence by the defendant, at folio 104, was properly excluded.

I. The non-production of the original was not accounted for.

II. It purported to be the unsworn declaration of third persons, themselves competent witnesses, and one of them examined as a witness.

III. Its contents were irrelevant.

Point XI.

The judgments below should, therefore, be affirmed, with costs.

JERE. LAROCQUE,
Of Counsel for Defendant in Error.

APPENDIX.

U. S. DISTRICT COURT.

AUGUSTIN VALARINO

vs.

WILLIAM D. THOMPSON, Consul, &c.

Plaintiff's Points on Demurrer.

This is a demurrer to a rejoinder, resulting from a plea in abatement to the plaintiff's declaration. The action is the common law action upon the common counts, against the defendant, as a consul. The plea is in abatement, on account of the non-joinder of one Sidney Mason, as a co-defendant. The replication confesses the plea, and shows, as matter in avoidance, that, at the time of the commencement of the action, the defendant, Thompson, was a consul, liable only to be impleaded in this court, and that Mason, the party not joined, was not a consul, and that this court had not and could not take cognizance of the plea against him. The rejoinder confesses the replication, and shows, as matter in avoidance, that the plaintiff was an alien, and Thompson and Mason were both citizens of the State of New-York, and residents within the Southern District of New-York at the time of the commencement of the action, and that both were liable to be impleaded in the Circuit Court of the United States for the Southern District of New-York. To this rejoinder the plaintiff has demurred, and the defendant has joined in the demurrer.

POINTS.

I. By the Constitution, the judicial power of the United States is declared to extend to "all cases affecting ambassadors, other public ministers and consuls."

Const. U. S., Art. 3, Sec. 2.
U. S. *vs.* Bavara, 2 *Dall.* 297.
U. S. *vs.* Ortega, 11 *Wheat.* 467.

II. By the judiciary act of the United States, the Supreme Court of the United States is declared to "have original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party."

1 U. S. Statutes at Large, p. 80, sec. 13.

III. By the same act, it is declared that the District Courts of the United States "shall have jurisdiction exclu-"sively of the courts of the several States, *of all suits against* "*consuls or vice-consuls*, except for offences above the "description aforesaid." The offences alluded to are criminal offences, punishable by whipping, fines, &c.

1 U. S. Statutes at Large, p. 77, sec. 9.

IV. The above are all the provisions of the Constitution, or statutes of the United States, conferring jurisdiction of suits affecting consuls upon any of its courts.

V. The Court of Appeals of the State of New-York, with the question directly presented in that court, upon an appeal from a judgment in favor of this plaintiff, against both Mason and Thompson, for the claim now in suit, assigning, as error in fact, that Thompson was a consul at the time of the commencement of the action in the State court, have distinctly

held, that the fact of the claim being a joint one against Mason and Thompson, did not deprive Thompson of his immunity from any jurisdiction, to which he would not be liable, if it were a claim against himself solely.

Valarino *vs.* Thompson, 3 *Selden*, 576.

VI. It is submitted, upon the authority of that decision, that the question presented upon the rejoinder in this case, whether an alien can sue a consul in the Circuit Court of the United States, when the consul is a citizen of the State where the suit is brought, must be determined purely on its merits, laying entirely out of view the fact of his being a joint contractor with another citizen in the case now before the court

VII. The Constitution and judiciary act, in all their grants of jurisdiction to the tribunals of the United States, make a distinct and perfect discrimination between the cases of ambassadors, ministers and consuls, and all other cases. They do not, in any instance, make the question of jurisdiction over any of those officers dependent upon the concurrence of circumstances of alienship or citizenship, in the incumbent of the office or in the adverse party.

The Amer. Ins. Co. *vs.* 356 Bales of Cotton,1 *Peters*, 545.

VIII. The manifest scope and tendency of all these provisions, is to treat the representative of the foreign government, whether minister or consul, for all purposes of jurisdiction, as the subject or citizen of the State which he represents.

The Exchange *vs.* M'Fadden, 7 *Cranch*, 116.
Wildes *vs.* Parker, 3 *Sumner's C. C. R.* 593.
Davis *vs.* Packard, 7 *Peters*, 276.
Valarino *vs.* Thompson, 3 *Selden*, 576.

IX.—The Circuit and District Courts of the United States derive their existence and jurisdiction wholly from the Acts

of Congress creating them, and there being no express grant of jurisdiction over consuls, to the Circuit Courts of the United States, the want of it cannot be supplied by construction.

Ex parte Bollman, 4 *Cranch*, 75.
Ex parte Cabrera, 1 *Wash. C. C. R.* 232.
Hart *vs.* Gray, 3 *Sumner's C. C. R.* 339.
U. S. *vs.* Hudson, 7 *Cranch*, 32.
Lorman *vs.* Clark, 2 *M'Lean's C. C. R.* 568.
Livingston *vs.* Jefferson, 1 *Brockenb. C. C. R.* 203.

X. On the contrary, the express grant of jurisdiction over consuls, both to the Supreme and District Courts of the United States, the grant to the latter being general, and fully exhausting the whole field of civil jurisdiction, and the profound silence of the act as to any grant of such jurisdiction to the Circuit Courts, necessarily exclude the idea of any such jurisdiction on the well established principle, "*Expressio unius est exclusio alterius.*"

XI. The rejoinder itself concedes that the District Court of the United States has not jurisdiction of a suit against a consul, and another not a consul, as joint contractors. This is clearly so upon the settled construction, that all the persons on each side, plaintiffs and defendants, having joint interests, must be of the class necessary to sustain the jurisdiction.

Strawbridge *vs.* Curtis, 3 *Cranch*, 267.
New-Orleans *vs.* Winter, 1 *Wheaton*, 91.
Taylor *vs.* Cook, 2 *M'Lean's C. C. R.* 516.

XII. The right to sue the defendant alone, in the only court which has jurisdiction over his person, results necessarily from this state of things, in order to prevent a failure of justice. The right to the joinder of all the joint contractors, as defendants, is an equitable right, not affecting the merits, and must yield to the pressure of greater equities on

the other side. The defendant has the same right to contribution against Mason, which he would have if he were joined, and can make the judgment proof against him, by notice of the existence of the suit.

Act of Congress of February 28, 1839.
5 *U. S. Stats. at Large*, p 321, Sec. 1.
Harrison *vs.* Urann, 1 *Story's C. C. R.* 64.
Suydam *vs.* Broadnax, 14 *Peters*, 67.
Wormley *vs.* Wormley, 8 *Wheaton*, 421.
Morrison *vs.* Bennett, 1 *M'Lean's C. C. R.* 330.
Ward *vs.* Arredondo, *Paine's C. C. R.* 410.
Breedlore *vs.* Nicolet, 7 *Peters*, 431.

XIII. The rejoinder is also bad in substance, as being a departure from the plea, and the judgment should be in favor of the plaintiff on that ground.

1. The most important requisite of a plea in abatement is, that it gave the plaintiff a better writ.

Chitty's Pleading, 481 and 491, marg. paging.

2. The meaning of this is, that the plea must supply him with the facts necessary to avoid the mistake which it is supposed that he has committed, either by an amendment in the same suit, or by another suit in the same court.

3. The plea in this case accordingly undertakes to state the facts which were necessary to enable the plaintiff to amend and bring in Mason, or to discontinue and bring a new suit in this court. It nevertheless did not state all that it was bound to state, as shown under a subsequent point.

4. If the rejoinder, on the other hand, shows any thing as a legal conclusion from the facts stated, it

is not that Mason should have been joined as a defendant in this suit in this court, but that no suit could be maintained in this court on the contract in question, either against Mason & Thompson jointly, or against either of them separately; in other words, it contains matter which goes wholly to the jurisdiction of the court, and not in abatement of the suit.

Rex *vs.* Sutton, 1 *Saund. R.* 274, *n.* 3.

5. This is clearly a departure from the plea.

1 *Chitty's Pleading*, 682 to 684, marg. paging.

XIV. The plea itself is bad in substance.

1. Being a plea in abatement, it must possess the highest degree of certainty known to the law. In the language of the books, it must be "certain to a certain intent in every particular."

1 *Chitty's Pleading*, 481, 491, marg. paging.
Ibid. pp. 267, 268.

2. The District Court of the United States being a court of special and limited jurisdiction, it was necessary for the defendant himself, in his plea, to allege the facts showing that any court of the United States would have jurisdiction of a suit against Mason & Thompson jointly. The onus, which he assumed by the rejoinder, to make out these facts, was upon him at the time of the plea; and the facts inserted in the rejoinder, if relied upon as a discharge of that duty, should have been in the plea, and not in the rejoinder.

1 *Chitty's Pleading*, 491, marg. paging.
Haworth *vs.* Spray, 8 *Term Rep.* 515, 516.
King *vs.* Cook, 4 *D. & R.* 592.
Swallow *vs.* Emberson, 1 *Lev.* 161.

3. The rule so well established, that the proceedings of the United States courts are void unless the record affirmatively shows jurisdiction, appears to be conclusive on this point.

Den *ex dem.* Walker *vs.* Turner, 9 *Wheat.* 541.
Wood *vs.* Wagnon, 2 *Cranch*, 9.
Montalet *vs.* Murray, 4 *Cranch*, 46.
M'Cormick *vs.* Sullivant, 10 *Wheat.* 192.
Conolly *vs.* Taylor, 2 *Peters*, 565.
Armstrong *vs.* Treasurer of Athens Co. 16 *Peters*, 281.
Gignon's Lessee *vs.* Astor, 2 *Howard*, 319.

XV. For these reasons the judgment should be for the plaintiff on the demurrer.

LAROCQUE & BARLOW,
Pl'ffs Att'ys.

J. LAROCQUE,
Of Counsel.